

MISSISSIPPI LAW JOURNAL

ARTICLES

AN OFFER IN COMPROMISE YOU CAN'T CONFUSE: IT IS
NOT THE OPENING BID OF A DELINQUENT TAXPAYER TO
PLAY LET'S MAKE A TAX DEAL WITH THE INTERNAL
REVENUE SERVICE

I. Jay Katz

CONSTITUTIONAL PROTECTIONS AGAINST THE HARMS TO
SUSPECTS IN CUSTODY STEMMING FROM PERP WALKS

Ryan Hagglund

COMMENTS

PATERNALISTIC MANIPULATION THROUGH PICTORIAL
WARNINGS: THE FIRST AMENDMENT, COMMERCIAL SPEECH,
AND THE FAMILY SMOKING PREVENTION AND TOBACCO
CONTROL ACT

Stephanie J. Bennett

AVOIDING ANNIHILATION: WHY TRIAL JUDGES SHOULD
REFUSE TO CERTIFY A FACTA CLASS ACTION FOR STATUTORY
DAMAGES WHERE THE RECOVERY WOULD LIKELY LEAVE THE
DEFENDANT FACING IMMINENT INSOLVENCY

Holly S. Hosford

IN DEFENSE OF SELF-DEFENSE: *HELLER*'S SECOND
AMENDMENT IN SENSITIVE PLACES

Brian C. Whitman



Published by Students at the
University of Mississippi School of Law

Volume 81

2012

Number 7



Digitized by the Internet Archive
in 2012 with funding from
LYRASIS Members and Sloan Foundation

<http://archive.org/details/mississippilawjo81ijay>

Become a Friend of the *Mississippi Law Journal*

Today the *Mississippi Law Journal* is funded and operated almost exclusively through student efforts. Increasingly, however, the *Journal* depends on the support of its alumni and friends. You can become a Friend of the *Mississippi Law Journal* by making a tax-deductible contribution to one of the funds listed below. Checks should be made payable to the University of Mississippi Foundation and mailed to Post Office Box 8288, University, Mississippi 38677. *Please indicate on your check to which fund you intend to contribute.*

Robert C. Khayat Scholarship Endowment

The Robert C. Khayat Scholarship Endowment was established in 1995 to honor the dedicated service of Robert C. Khayat, a *Journal* alumnus, professor of law, and chancellor emeritus of the university. Each year the *Journal* awards the Robert C. Khayat scholarship to a deserving member.

***Mississippi Law Journal* Endowment**

The *Mississippi Law Journal* Endowment exists to ensure the *Journal's* future financial stability. As an entity financially independent of the school of law, the *Journal* depends partially on this endowment to fund its operations.

***Mississippi Law Journal* Operating Fund**

All contributions to the *Mississippi Law Journal's* operating fund help the *Journal* to meet its most immediate needs, including the cost of publication.

FRIENDS OF THE *MISSISSIPPI LAW JOURNAL**

DR. GUTHRIE T. ABBOTT
MRS. PAULA GRAVES ARDELEAN
THE HONORABLE RHESA H. BARKSDALE
MR. ROSS F. BASS JR.
MR. WILLIAM H. BECK JR.
BENNETT LOTTERHOS SULSER AND WILSON
THE HONORABLE WILLIAM H. BIZZELL
THE HONORABLE EUGENE M. BOGEN
MRS. TERI M. BOWIE
MRS. LORRAINE WALTERS BOYKIN
MR. JOHN R. BRALEY IV
MR. CHARLES L. BROCATO
MR. JASON W. BURCH
MR. JAMES T. CALDWELL
THE HONORABLE THAD COCHRAN
MR. RICHARD G. COWART
MR. T. DAVID COWART
MR. FRANK CROSTHWAITE JR.
MR. ARLEN B. COYLE
MR. WILLIAM M. DEAVOURS
MRS. MARLANE DOVE
MR. W. W. DRINKWATER JR.
DULIN & DULIN LTD.
LT. COMMANDER W.J. DUNAWAY
DR. WYLENE W. DUNBAR
MR. RICHARD M. EDMONSON SR.
MR. HERBERT C. EHRHARDT
DR. MARTHA JANE ELLIS
MR. ROGER M. FLYNT JR.
MR. WILLIAM M. GAGE
MR. ROBERT C. GALLOWAY
MRS. GRETCHEN L. GENTRY
MR. EUGENE B. GIFFORD JR.
MR. HAMPTON GLOVER JR.
MR. WILLIAM N. GRAHAM
MRS. LILLOWS ANN S. GRAYSON
MR. NEWT P. HARRISON
MR. ROBERT H. HODGES
MR. JAMIE G. HOUSTON III
MR. GARY K. JONES
MR. W.R. JONES JR.
MR. WILLIAM T. JONES
MRS. PATRICIA FLEMING KENNEDY
MR. WILLIAM N. KRUCKS
THE HONORABLE TOM STEWART LEE
MRS. VIRGINIA C. LOCOCO
MR. ROLAND MARBLE SR.
MR. M.C. MAXWELL
MS. LYDIA H. MCINTOSH
MR. JASON N. MCNEEL
MR. JOSEPH R. MEADOWS
MICHAEL T. & PAULINE S. LEWIS
MR. RUSSELL W. MILLS
MR. DAVID W. MOCKBEE
MR. H. DIXON MONTAGUE
MR. DALTON M. MOUNGER

MRS. TRUDY LUMPKIN MUENCH
MRS. JULIE SNEED MULLER
MR. CHRISTOPHER TYSON NETTLES
MR. JAMES W. O'MARA
THE HONORABLE J. D. ORLANSKY
MR. TOM OSTENSON
MR. JAMES A. PEDEN JR.
MR. LEROY D. PERCY
MR. RICHARD T. PHILLIPS
MR. RUBEL L. PHILLIPS
MR. BENJAMIN J. PIAZZA JR.
MR. GEORGE B. PICKETT JR.
MR. C. MICHAEL PUMPHREY
MR. CLAYTON C. PURDOM
MR. HOLLAMAN M. RANEY
MR. ERIC TYSON RAY
MR. RICHARD ROBERTS III
MR. LUCIUS F. SAMS JR.
MS. LILLOUS A. SHOEMAKER
MR. GEORGE M. SIMMERMAN JR.
MR. JIMMY SLEDGE JR.
MR. W. MARION SMITH
MR. RONALD T. SOLBERG
MR. DARRELL SOLOMON
MR. ARTHUR D. SPRATLIN JR.
MRS. PATRICIA L. STEVENS
MR. PHINEAS STEVENS
MR. SAMUEL JAMES STIGLER
MRS. MOLLY FERGUSON STUART
MRS. NANCY H. STUMBERG
MS. MARGARET J. MURPHY SWEETLAND
MR. FRANK W. TRAPP
MR. CLINT DOUGLAS VANDERVER
MR. J. P. VARNER
MR. LAWRENCE D. WADE
MRS. MICHELLE CLINGAN WAITS
MR. TIM WALSH
MR. GEORGE D. WARNER JR.
MR. IRWIN G. WATERMAN
MR. LOUIS H. WATSON JR.
MR. WALKER L. WATTERS
DR. ROBERT A. WEEMS
MR. EDDIE C. WILLIAMS
CAPT. RONALD J. WOJDYLA

** As of April 1, 2012*

The *Mississippi Law Journal* is published seven times during the academic year. The *Journal's* editorial and business offices may be contacted via U.S. mail at: Post Office Box 849, University, Mississippi 38677.

Manuscripts: Manuscripts should be submitted electronically to misslj@olemiss.edu. Manuscripts should be in 12-point type and double-spaced, in Microsoft Word, WordPerfect, or PDF. Citations should conform to *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* (19th ed. 2010).

Subscriptions: \$35.00 per year for domestic subscriptions; \$40.00 per year for foreign subscriptions. Single issue: \$15.00. Subscriptions are renewed automatically upon expiration unless the subscriber sends a notice of termination.

Change of address: Send address changes directly to the *Mississippi Law Journal*. Include name, new address (including zip code) and old address. Please notify the *Journal* forty-five days in advance to ensure prompt delivery.

Back Issues: Back issues of the *Mississippi Law Journal* may be ordered directly from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14029-1987. Orders may also be placed by calling William S. Hein & Co., Inc., at (800) 828-7571, via fax at (716) 883-8100 or email to order@wshein.com. Back issues are available in PDF format through HeinOnline.

The *Mississippi Law Journal* is a member of the National Conference of Law Reviews. To offer its contributors complete freedom, the *Journal* assumes no responsibility for the views expressed herein.

Mississippi Law Journal

Published by Students at the
University of Mississippi School of Law

VOLUME 81

2012

NUMBER 7

Copyright © 2012, Mississippi Law Journal, Inc.

Editor-in-Chief

BRENT COLE

Executive Editor

J. MORGAN STEPHENS

Executive Articles Editors

ALAN BAKER

MICHAEL BARBEE

LUKE CANTRELL

ADRIA HERTWIG

LOREN MCRAE

Business Manager

WILL CRAVEN

Executive Supra Editor

BRITTANY BARTLEY

Notes & Comments Editors

ANDREW S. HARRIS

KATE VAN NAMEN

Mississippi Cases Editor

PATRICK LOFTON

Associate Editors

Articles Editors

MICHAEL ATTAWAY

PARKER BERRY

ROBERT CAIN

ROBERT FORD

WES FRANCIS

CASSI FRANKS

KATHLEEN INGRAM

MARY JORDAN KIRKLAND

BRYAN SAWYERS

AUSTIN STOKES

Mississippi Cases Editors

CHRISTINE BOCEK

JOHN CARRINGTON

JOSH DANIEL

ANDREW TOMINELLO

Technical Editor

APRIL H. KILLCREAS

Symposium Editor

JEFFREY BROWN

Supra Editors

ELLIOTT FLAGGS

MATT SITTON

Notes & Comments Editor

ELIZABETH HYDE

Faculty Advisors

DEBORAH H. BELL

JOHN CZARNETZKY

ROBERT A. WEEMS

Staff Editors

STEPHANIE JORDAN BENNETT
STEVEN BENTLEY
ALEX BONDURANT
TRAVIS BRACKIN
DAVID BUNT
SUSAN ELLEN BURGIN
EMILY CARROLL
RISHER CAVES
TULLIO D. CHIRINOS
LAURA ELIZABETH COLLINS
CHARLES COWAN
SARAH DICKEY
ERIN DOCTOR
M. DAVIDSON FORESTER III
HALEY FOWLER
JOHN HENSLEY
WHITNEY HOLLIDAY

HOLLY HOSFORD
KATHERINE KIMMEL
MARY KRISTEN KYLE
MEAGAN LINTON
R. BENJAMIN MCMURTRAY
GRANT MULLINS
EVAN PARROTT
ERICA PEDEN
CODY ROEBUCK
WARREN A. STAFFORD
EMILY LOGAN STEDMAN
ANNA SWEAT
KIMBERLY THOMPSON
JACK WEST
BRIAN WHITMAN
MICHAEL WILLIAMS
SUNEISHA WILLIAMS

ADMINISTRATIVE OFFICERS OF THE UNIVERSITY OF MISSISSIPPI

DANIEL W. JONES	<i>Chancellor</i>
MORRIS H. STOCKS	<i>Provost and Vice Chancellor for Academic Affairs</i>
ALICE M. CLARK	<i>Vice Chancellor for Research and Sponsored Programs</i>
LARRY D. SPARKS	<i>Vice Chancellor for Administration and Finance</i>
WENDELL WEAKLEY	<i>President and CEO, The University of Mississippi Foundation</i>
ANDREW P. MULLINS JR.	<i>Chief of Staff to the Chancellor</i>
TIMOTHY L. WALSH	<i>Executive Director of Alumni Affairs</i>
I. RICHARD GERSHON	<i>Dean of the School of Law and Professor of Law</i>

THE LAW SCHOOL FACULTY

GUTHRIE T. ABBOTT, <i>Professor Emeritus of Law and Butler, Snow, O'Mara, Stevens and Cannada Lecturer in Law Emeritus</i>
MICHELE ALEXANDRE, <i>Assistant Professor of Law</i>
RICHARD L. BARNES, <i>Professor of Law and Leonard B. Melvin, Jr. Distinguished Lecturer in Law</i>
DEBORAH H. BELL, <i>Professor of Law and Mississippi Defense Lawyers Association Distinguished Lecturer in Law</i>
WILLIAM W. BERRY III, <i>Assistant Professor of Law</i>
PERCY J. BLOUNT, <i>Research Counsel and Instructor, National Center for Remote Sensing, Air and Space Law</i>
JOHN R. BRADLEY JR., <i>Professor of Law</i>
PHILLIP W. BROADHEAD, <i>Director, Clinical Appeals Program and Clinical Professor of Law</i>
CHARLES BROWER II, <i>Croft Professor of International Law and Jessie D. Puckett, Jr. Lecturer in Law</i>
MERCER E. BULLARD, <i>Associate Professor of Law</i>
LARRY BUSH, <i>Professor Emeritus of Law</i>
W. TUCKER CARRINGTON, <i>Director, Mississippi Innocence Project</i>
DAVID W. CASE, <i>Associate Professor of Law</i>
THOMAS K. CLANCY, <i>Director of the National Center for Justice and the Rule of Law and Research Professor of Law</i>
GEORGE C. COCHRAN, <i>Professor of Law</i>
AARON S. CONDON, <i>Professor Emeritus of Law</i>
BENJAMIN P. COOPER, <i>Assistant Professor of Law</i>
JOHN M. CZARNETZKY, <i>Professor of Law and Mitchell, McNutt, and Sams Lecturer</i>
DONNA DAVIS, <i>Associate Professor of Law</i>
SAMUEL M. DAVIS, <i>Jamie L. Witten Chair of Law and Government and Professor of Law</i>
JASON DERRICK, <i>Acting Assistant Professor of Legal Writing</i>
D. MICHAEL FEATHERSTONE, <i>Professor Emeritus of Law</i>
MOLLY FERGUSSON, <i>Acting Assistant Professor of Legal Writing</i>
DON L. FRUGE, <i>Professor Emeritus and President and CEO Emeritus of the University of Mississippi Foundation</i>

JOANNE I. GABRYNOWICZ, *Director of the National Remote Sensing, Air and Space Law Center and Research Professor of Law*

KRIS L. GILLILAND, *Director of Law Library and Associate Professor of Law*

CHRISTOPHER R. GREEN, *Assistant Professor of Law*

KAREN O. GREEN, *Professor of Law and Mississippi Defense Lawyers Association Distinguished Lecturer in Law*

MATTHEW R. HALL, *Associate Dean for Academic Affairs, Associate Professor of Law and Jessie D. Puckett, Jr., Lecturer*

DESIREE HENSLEY, *Assistant Professor of Law and Director of Civil Legal Clinic*

MICHAEL H. HOFFHEIMER, *Professor of Law and Mississippi Defense Lawyers Association Distinguished Lecturer in Law*

ROBERT C. KHAYAT, *Chancellor Emeritus and Professor Emeritus of Law*

PATRICIA KRUEGER, *Acting Assistant Professor of Legal Writing and Director of Academic Excellence Program*

DON MASON, *Associate Director of the National Center for Justice and the Rule of Law and Lecturer*

GARY MYERS, *Professor of Law and Associate Dean for Research*

JACK W. NOWLIN, *Associate Professor of Law and Jessie D. Puckett, Jr., Lecturer*

NIKI PACE, *Research Counsel, Mississippi-Alabama Sea Grant*

E. FARISH PERCY, *Associate Professor of Law and Jessie D. Puckett, Jr., Lecturer*

LARRY J. PITTMAN, *Professor of Law and Jessie D. Puckett, Jr., Lecturer*

LISA S. ROY, *Associate Professor of Law and Jessie D. Puckett, Jr., Lecturer*

RONALD J. RYCHLAK, *Professor of Law and Mississippi Defense Lawyers Association Lecturer in Law*

JACQUELINE SERRAO, *Associate Director and Instructor, National Remote Sensing, Air and Space Law Center*

STEPHANIE SHOWALTER-OTTS, *Director of the National Sea Grant Law Center and Adjunct Professor of Law*

HANS P. SINHA, *Director of Prosecutorial Externship Program and Clinical Professor of Law*

CAROLYN ELLIS STATON, *Provost Emeritus and Professor Emeritus of Law*

ROBERT A. WEEMS, *Professor of Law and Butler, Snow, O'Mara, Stevens and Cannada Lecturer in Law*

WILL WILKINS, *Director of the Mississippi Law Research Institute*

C. JACKSON WILLIAMS, *Director of Legal Writing Program and Acting Assistant Professor of Legal Writing*

PARHAM H. WILLIAMS JR., *Dean Emeritus and Professor Emeritus of Law*

MISSISSIPPI LAW JOURNAL

Published by Students at
The University of Mississippi School of Law

VOLUME 81

2012

NUMBER 7

TABLE OF CONTENTS

ARTICLES

AN OFFER IN COMPROMISE YOU CAN'T CONFUSE: IT IS
NOT THE OPENING BID OF A DELINQUENT TAXPAYER TO
PLAY LET'S MAKE A TAX DEAL WITH THE INTERNAL
REVENUE SERVICE

..... *I. Jay Katz* 1673

CONSTITUTIONAL PROTECTIONS AGAINST THE HARMS
TO SUSPECTS IN CUSTODY STEMMING FROM PERP
WALKS

..... *Ryan Hagglund* 1757

COMMENTS

PATERNALISTIC MANIPULATION THROUGH PICTORIAL
WARNINGS: THE FIRST AMENDMENT, COMMERCIAL
SPEECH, AND THE FAMILY SMOKING PREVENTION AND
TOBACCO CONTROL ACT

..... *Stephanie J. Bennett* 1909

AVOIDING ANNIHILATION: WHY TRIAL JUDGES SHOULD
REFUSE TO CERTIFY A FACTA CLASS ACTION FOR
STATUTORY DAMAGES WHERE THE RECOVERY WOULD
LIKELY LEAVE THE DEFENDANT FACING IMMINENT
INSOLVENCY

..... *Holly S. Hosford* 1941

IN DEFENSE OF SELF-DEFENSE: *HELLER*'S SECOND
AMENDMENT IN SENSITIVE PLACES

..... *Brian C. Whitman* 1987

AN OFFER IN COMPROMISE YOU CAN'T CONFUSE: IT IS NOT THE OPENING BID OF A DELINQUENT TAXPAYER TO PLAY LET'S MAKE A TAX DEAL WITH THE INTERNAL REVENUE SERVICE

I. Jay Katz*

INTRODUCTION.....	1678
I. DEVELOPMENT OF OFFER POLICY IN THE EARLY YEARS OF FEDERAL INCOME TAXATION.....	1681
A. A Landmark Supreme Court Decision Held that Section 3229—the First Offer Statute—Prescribed the Exclusive Method for Compromising Tax Cases	1681
B. Attorney General Dictated Offer Acceptance Standard to be Implemented by the Service	1683
1. Attorney General Proclaimed Doubt as to Liability or Doubt as to Collectability as the Sole Basis for Compromise.....	1683
2. Attorney General Deviated From Collectability Standard and Approved Financial Hardship as a Basis to Compromise Penalties and Interest	1685
3. An Attorney General Opinion Ruling the Collectability Standard Was to Be Applied to Compromises of Tax, Penalties and Interest Marked the End of the Penalty Hardship Standard	1686

* Former Associate Professor of Law, Widener University School of Law and Adjunct Professor, Temple University School of Law; LL.M. in Taxation, University of Florida, College of Law, Graduate Tax Program, 1991.

The author dedicates this article to his wife Peggy Katz who throughout months of endless writing and editing was unwavering in her unconditional love and support. Without her inspiration and patience, the completion of this Article would have not been possible.

The author also expresses his gratitude to the incomparable staff of the *Mississippi Law Journal*. The passion of the editors and their belief in this Article has been an invaluable inspiration to the author.

4. High Ranking Treasury Officials Echoed Attorney General's Rejection of a Compromise Standard Based On Economic Hardship.....	1688
5. Did an Executive Order and Two 1934 Attorney General Opinions Grant the Attorney General Exclusive Compromise Authority with Greater Discretion to Approve Offers in Cases Referred to the Department of Justice?	1690
<i>a. The Attorney General Opinions and the Executive Order.....</i>	1690
<i>b. The Attorney General Opinions and Executive Order did not Deter the Attorney General and the Service from Working Together in Unison After Tax Cases were Referred to the Department of Justice</i>	1693
<i>c. Attorney General Adhered to the Collectability Standard in His Consideration of Offers Submitted to the DOJ.....</i>	1694
<i>C. The Commissioner's Statement of Policy with Respect to the Compromise of Taxes, Interest, and Penalties Dated July 2, 1934, Established Maximum Collection Amount as the Baseline for an Acceptable Offer</i>	1694
II. CONGRESSIONAL INVESTIGATIONS OF CORRUPTION IN THE SERVICE IN THE EARLY 1950S LED TO TRANSPARENCY OF OFFER ACCEPTANCES AND OTHER CHANGES IN THE OFFER APPROVAL PROCESS	1695
<i>A. President Truman Yielded to Congressional Pressure and Issued an Executive Order Directing Accepted Offers be Open to Public Inspection.....</i>	1696
<i>B. Public Disclosure of Accepted Offer Details Revealed Service Bias and Incompetency in Processing Offers</i>	1698
<i>C. Overhaul of the Service Pursuant to Reorganization Plan No. 1 Resulted in a More Streamlined Offer Process.....</i>	1700
III. SERVICE'S OFFER POLICY: 1953-1992	1702
<i>A. Case Study Models of the Offer Review Process Published in Revenue Ruling 117 Provided Little</i>	

<i>Insight of How to Factor Present and Future Income into the Computation of the Maximum Collection Amount</i>	1702
<i>B. Some Offers Mandate Taxpayer Concessions of Certain Tax Benefits</i>	1705
1. Tax Benefit Collateral Agreements	1705
2. Other Tax Benefit Concessions	1707
<i>C. General Public Unawareness of Offer Procedure, the Lack of a Quantitative Formula to Compute the Maximum Collection Amount, and Tedious Hard-to-Monitor Collateral Agreements Stifled Offer Submissions and Acceptances</i>	1708
1. The Salient Details of Offer Policy and Procedure Found Exclusively in the Internal Revenue Manual—A Document Not Available to the General Public	1708
2. Lack of Quantitative Formula to Compute the Maximum Collection Amount	1709
3. Collateral Agreements Were Tedious to Complete and Hard to Monitor	1711
IV. THE SERVICE'S 1992 MAJOR OVERHAUL OF THE OFFER PROGRAM	1715
<i>A. Low Offer Submissions and Acceptances Attributable to Lack of Service Personnel Commitment to Offers and Uncertainty in Determining the Adequacy of an Offer</i>	1715
<i>B. Due to Lackluster Collections of Delinquent Tax Liabilities the Service Revised Its Offer Objectives and Procedures</i>	1716
1. The Service Created a Mathematic Formula to Compute the Reasonable Collection Potential	1717
<i>a. The Reasonable Collection Standard Formula</i>	1718
2. Another Service Objective—Taxpayer Compliance	1720
<i>C. Modifications to the 1992 Offer Policy</i>	1721
1. A 1993 GAO Study Noted Lack of Uniformity in Offer Policy	1721
2. The Service's New Standards for Allowable	

Monthly Expenses Were Criticized.....	1722
3. The Service Unceremoniously Modified the Reasonable Collection Potential Formula by Substituting Current Market Value for Quick Sale Value and Eliminating the Present Value Discount in Computation of Monthly Disposable Income.....	1723
4. The Taxpayer Bill of Rights 2 Eliminated Some Red Tape in the Offer Process.....	1724
V. CONGRESS'S LIFTING OF THE ATTORNEY GENERAL'S BAN ON CONSIDERING FINANCIAL HARDSHIP, EQUITY AND PUBLIC POLICY AS THE BASIS FOR AN OFFER FAILED TO LIVE UP TO ITS PROMISE	1724
<i>A. New Section 7122(c) Directing the Service to Establish Adequate Allowances for the Basic Living Expenses of Taxpayers Submitting Offers was Underwhelming.....</i>	1726
<i>B. Actions Speak Louder Than Words—Two New Types of Effective Tax Administration Offers were of Questionable Utility to the Taxpayer</i>	1727
1. The Temporary Regulations.....	1727
2. The Final Regulations Narrowed the Scope and Viability of ETA Offers.....	1729
<i>a. Non-Individual Business Taxpayers Not Eligible for Hardship Offer</i>	1729
<i>b. Final Regulations Effectively Eviscerate the Vitality of Public Policy Offers.....</i>	1730
<i>C. The Service Quietly Created a New Type of Hardship Offer Based on Doubt as to Collectability with Special Circumstances</i>	1736
VI. THE SERVICE'S RESTRICTIVE ACCEPTANCE POLICY OF ETA OFFERS REAFFIRMED ITS DE FACTO COMMITMENT TO MAXIMUM COLLECTION.....	1737
<i>A. The Limited Judicial Review of Offers Rejected by the Service at a Collection Due Process Hearing Provided by RRA 1998 Benefits the Service Rather than the Taxpayer.....</i>	1737
<i>B. The Ninth Circuit Affirmed Sixteen Tax Court Decisions Holding the Service Did Not Abuse Its</i>	

<i>Discretion in Rejecting Public Policy and Hardship Offers of Partners Victimized by the Fraudulent Activities of a Tax Shelter Promoter</i>	1739
1. The Service's Twenty-Year Mission to Unravel the Hoyt Partnerships Cumulated in the Assessment of a Substantial Amount of Tax, Interest, and Penalties Against the Taxpayer/Partners	1739
<i>a. The Ninth Circuit Affirmed the Tax Court Decisions Holding that the Service's Rejection of the Taxpayers' Public Policy Offers Based on the Fraudulent Actions of Hoyt and an Undue Delay in the Service's Resolution of Their Tax Liability Was Not an Abuse of Discretion</i>	1741
<i>C. Keller and the Tax Court Opinions it Affirmed Validated the Service's Position that Hardship Offers Must be Considered Within the Framework of Present Circumstances</i>	1743
1. Speculative Future Medical Expenses not Deemed to be a Financial Economic Hardship	1743
2. Future Estimated Medical Expenses Not to be Factored into the Computation of Reasonable Collection Potential.....	1745
<i>D. Perceived Unfair Application of Tax Laws Not an Acceptable Basis for a Public Policy Offer</i>	1746
VII. THE COURTS ARE SPLIT ON WHETHER THE SERVICE CAN BE COMPELLED TO CONSIDER THE OFFER OF A TAXPAYER IN BANKRUPTCY	1748
<i>A. Cases Holding that the Service Must Consider the Offer of a Taxpayer in Bankruptcy</i>	1748
<i>B. Cases Holding the Service Has No Duty to Consider the Offer of a Taxpayer in Bankruptcy</i>	1751
VIII. THE TAX INCREASE PREVENTION AND RECONCILIATION ACT OF 2005 REQUIRES A TAXPAYER TO PUT HER MONEY WHERE HER OFFER IS	1753
CONCLUSION	1754

INTRODUCTION

Tax relief “pitch men” who promise to settle substantial tax liability with the Internal Revenue Service (Service)¹ for “pennies on the dollar” would lead delinquent taxpayers to believe that an offer in compromise (Offer) is an opening bid to engage in tax gamesmanship. In reality, they are either deceiving their clients,² lack a true understanding of the state of the law, or are in denial of the Service’s mission to collect the total amount of tax due with the presumption “that the correct application of the tax laws produces a fair and equitable result, absent exceptional circumstances.”³

Although it is true that section 7122 of the Internal Revenue Code of 1986 (Code) grants the Service the authority to “compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense,”⁴ it is inconceivable that Congress would have created an income tax system that would foster open negotiations between taxpayers and the Service to make tax deals. Stated differently, if tax liability was negotiable, all taxpayers would be “delinquent” taxpayers because they would have no incentive to pay the amount due, opting instead to cut a better deal with the Service to pay a lower amount. Consequently, the income tax laws would not be taken seriously and the actual amount of tax revenues collected by the Service would be unpredictable.

Therefore, Congress must have intended the Service’s compromise authority to be consistent with the integrity of the tax system. In fact, the appropriate level of authority was derived from the meaning of the word “compromise.” A compromise is the resolution of a dispute between two parties who, due to the

¹ For purposes of this Article, the terms “Service” and “Commissioner” are used interchangeably.

² See *Texas v. Taxmasters, Inc.*, No. D-1-GV-10-000486, 2012 WL 1141528 (Tex. D. Ct., Travis Cnty. March 30, 2012), as an example of such deception. In that case, a jury rendered a verdict against the infamous “pennies on the dollar” Taxmasters and its founder Patrick Cox to pay \$195 million in restitution and penalties with respect to its multitude of gullible clients who were defrauded and misled by deceptive practices and false promises of pennies-on-the-dollar settlements of tax liability with the Service.

³ T.D. 9007, 2002-2 C.B. 349, 350.

⁴ I.R.C. § 7122(a) (2006).

uncertainty of their positions, reach some middle ground by means of mutual concessions. So if a taxpayer is capable of paying a valid tax liability in full, there is no reason for the Service to compromise any portion of the liability. On the other hand, if the validity of the tax liability or the taxpayer's ability to pay it in full is uncertain, there is a legitimate basis for the Service to compromise. Not surprisingly, the original two bases for compromise were 1) doubt as to liability and 2) doubt as to collectability.

Yet, if a valid tax liability is exorbitant, a taxpayer compelled to pay it in full may be forced to go out of business or become financially unable to provide for her basic living expenses. This scenario was not uncommon during the Great Depression. Consequently, in the midst of that period, to provide those taxpayers with relief, the Secretary of the United States Department of the Treasury (Secretary of the Treasury) proposed that the Service be permitted to consider factors such as financial hardship, equity, and public policy as the basis for an Offer. Unfortunately, in spite of being sympathetic to the plight of such taxpayers, the Attorney General of the United States (Attorney General) ruled that the Service lacked the authority to compromise the tax liability of a taxpayer capable of paying it in full regardless of the resulting debilitating adverse financial consequences.

From the 1930s until the early 1990s, Offers were rarely made because Offer policy and procedures were unknown to most taxpayers, the actual mechanics of the Offer process were vague and inexact, and—perhaps most importantly—they were disfavored by the Service. In 1992, in an effort to bolster lackluster collections and to collect as much of the \$111 billion of delinquent tax liability as possible, the Service instituted dramatic changes to its Offer policy by adopting more realistic collection objectives, creating a quantitative formula to compute an acceptable Offer as well as making the process more user friendly and accessible for the taxpayer.

Then, in 1998, in an apparent effort to liberalize the Offer process even further, Congress enacted the Internal Revenue

Service Restructuring Act of 1998.⁵ In the legislative history, Congress encouraged the Service to design new types of Offers based on financial hardship, equity, and public policy. Although the Service did respond by creating those types of Offers, the Service imposed stringent restrictive acceptance standards that most taxpayers were unable to meet.

Ironically, although the Internal Revenue Service Restructuring Act of 1998 also granted taxpayers a judicial review of Offers rejected by the Service as a procedural safeguard against the Service's aggressive collection actions, in operation, it actually emboldened the Service's increasingly hard-line acceptance standards. This was because most court decisions upheld the Service's Offer rejections; and, thus, validated whatever rationale the Service advanced for rejecting the taxpayer's Offer. Therefore, the Service had no reason to ease its acceptance standards.

Moreover, as evidenced by the enactment of the Tax Increase Prevention and Reconciliation Act of 2005,⁶ Congress demonstrated its approval of a stringent Offer policy. In that legislation, Congress made the Offer process more problematic for the taxpayer by requiring taxpayers to make up-front non-refundable payments as a condition of submitting an Offer. In essence, a taxpayer desiring to make an Offer would be required to pre-fund it without any assurance that it would be accepted. So, as this is the current state of the law, the likelihood of a taxpayer submitting an acceptable Offer remains very low.

The purpose of this Article is to explain how the Offer process has evolved into what it is today, i.e., a collection alternative that is by no means a panacea for the delinquent taxpayer, by chronicling and analyzing every relevant major development from the infancy of federal income taxation to the present day.

⁵ Pub. L. No. 105-206, 112 Stat. 685 (1998).

⁶ Pub. L. No. 109-222, 120 Stat. 345 (2006).

I. DEVELOPMENT OF OFFER POLICY IN THE EARLY YEARS OF FEDERAL INCOME TAXATION

A. A Landmark Supreme Court Decision Held that Section 3229—the First Offer Statute—Prescribed the Exclusive Method for Compromising Tax Cases

Section 7122 of the Code is one of the longest running statutes in the history of American taxation. Originally enacted as Revised Statute 3229 of the Act of 1868,⁷ and subsequently amended by the Act of 1874,⁸ section 3229 remained in effect with the passage of the Revenue Act of 1913.⁹ Section 3229 provided as follows:

The Commissioner of the Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws instead of commencing suit thereon; and, with the consent of said Secretary and the recommendation of the Attorney General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed in the office of the Commissioner, the opinion of the Solicitor of Internal Revenue, or of the office acting as such, with his reasons therefore, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise.¹⁰

Significantly, section 3229 divided tax cases into two categories: 1) those not yet in litigation; and 2) those in which a suit had been commenced. In the first category of cases, the Service lacked the authority to accept an Offer without the approval of the Secretary of the Treasury. In the second category of cases, the Attorney General's approval was also required. In all cases, the solicitor of

⁷ H.R. 1284, 40th Cong., ch. 186 (2d Sess. 1868), 15 Stat. 125, 166.

⁸ H.R. 1215, 43rd Cong. (1st Sess. 1868).

⁹ Ch. 16, 38 Stat. 114 (1913).

¹⁰ 15 Stat. 125, 166.

the Internal Revenue Service was required to file a written opinion explaining the rationale for the acceptance of the Offer in the office of the Commissioner.

Botany Worsted Mills v. United States, decided in 1929, was the only Supreme Court decision to interpret section 3229 or any of its successor sections.¹¹ In that case, after protracted negotiations, the taxpayer and the Service agreed to resolve a tax dispute by the taxpayer conceding the Service's disallowance of a bonus deduction in exchange for the Service conceding the taxpayer's claim for a reserve charged off as an expense.¹² In executing the agreement, however, none of the protocol of section 3229 was followed.

Consistent with the agreement, the taxpayer filed an amended return and paid the additional tax.¹³ Subsequently, the taxpayer reneged on the agreement and filed a claim for a refund of the tax attributable to the bonus deduction.¹⁴ After the Service rejected the taxpayer's claim, the taxpayer filed a petition for refund in the Court of Claims.¹⁵

The issue presented was whether the agreement between the Service and a taxpayer that did not follow the protocol of section 3229 was enforceable by the Service. Arguing that section 3229 prescribed the exclusive way to resolve tax cases, the taxpayer contended that any other type of settlement agreement was non-binding.¹⁶ Conversely, the Service contended that the taxpayer was estopped to challenge the validity of the agreement because the taxpayer had enjoyed the tax benefit of the Service's concessions of the reserve issue.¹⁷ Accepting the Service's estoppel argument, the Court of Claims ruled in the Service's favor.¹⁸

Significantly, on appeal to the Supreme Court, the Service abandoned its estoppel argument and argued the case on the

¹¹ 278 U.S. 282 (1929).

¹² *Id.* at 284-86.

¹³ *Id.* at 284, 286-87.

¹⁴ *Id.* at 284-85.

¹⁵ *Id.* at 284.

¹⁶ *Id.* at 287.

¹⁷ *Id.* at 286.

¹⁸ *Id.* at 285.

merits of its previous disallowance of the bonus deduction.¹⁹ Ironically, in holding against the taxpayer on the merits, the Supreme Court endorsed the taxpayer's position that "Congress intended by [section 3229] to prescribe the exclusive method by which tax cases could be compromised When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."²⁰ Thus, *Botany Worsted Mills* established the precedent that a compromise between the Service and the taxpayer was not binding on either party unless it complied with the protocol of section 3229.

B. Attorney General Dictated Offer Acceptance Standard to be Implemented by the Service

In the interpretation of tax statutes, it is the normal function of the Service to establish the parameters of their scope through the promulgation of appropriate regulations. This was not the case with regard to section 3229, however, as the standards for acceptable Offers were established in numerous Attorney General opinions—many of which predated the enactment of the Sixteenth Amendment.

1. Attorney General Proclaimed Doubt as to Liability or Doubt as to Collectability as the Sole Basis for Compromise

At first blush, it would have appeared that section 3229 granted the Service limitless authority to accept taxpayer Offers. This was because, other than requiring high-level approval for final acceptance, section 3229 provided no specific limitations or guidelines with regard to the Service's authority to "compromise." Yet, in spite of the absence of any restrictive provisions, it was clear from the outset that the Offer process was never intended to be an exercise of tax gamesmanship between the taxpayer and the Service. Indeed, in numerous opinions issued prior to and following the enactment of the Revenue Act of 1913, the Attorney

¹⁹ *Id.* at 287-88. In fact, in the solicitor general's brief, the Service essentially conceded its estoppel argument accepting that binding agreements between the taxpayer and the Service must conform with all statutory formalities of section 3229. *Id.*

²⁰ *Id.* at 288-89.

General had ruled that the Service's authority to compromise was very restrictive. Those opinions focused on the meaning of the word "compromise" as a give-and-take proposition in which the taxpayer and the government both had something to gain and lose.²¹ To illustrate this point, one such Attorney General opinion defined the parameters of a "compromise" as: "A compromise implies some mutuality of concession, some real doubt about the legality of the claim, or the ability to meet it"²²

So, as to a taxpayer capable of paying a valid tax liability in full, the Service would have nothing to compromise. On the other hand, if the validity of the underlying tax liability were questionable (i.e., the taxpayer could potentially prevail in litigation) or the taxpayer lacked the financial resources to pay the liability in full, a compromise would be mutually beneficial to resolve the taxpayer's tax liability for a lesser amount and to save the Service the costs of pursuing collection that would likely yield no more than the amount offered. Accordingly, the Attorney General established doubt as to liability and doubt as to collectability (Collectability Standard) as the sole basis for compromise.²³ In fact, long before the enactment of the Revenue Act of 1913, numerous Attorney General opinions ruled that the valid tax liability of a solvent taxpayer could never be compromised.²⁴ Consistent with those opinions, early income tax treasury regulations adopted the same rule.²⁵

²¹ See *Compromise of Claims Under §§ 3469 and 3229 of the Revised Statutes—Power of the Att'y Gen. in Matters of Compromise*, 38 Op. Att'y Gen. 98 (1933); *Auth. of Sec'y of the Treas. to Compromise Final Judgments*, 36 Op. Att'y Gen. 40 (1929); *Sec'y of Treas.—Compromise of Judgment*, 23 Op. Att'y Gen. 18 (1900); *Internal Revenue*, 16 Op. Att'y Gen. 248 (1879).

²² 16 Op. Att'y Gen. at 250.

²³ In *Botany Worsted Mills*, had the Commissioner and the taxpayer actually compromised their dispute in accordance with the formalities of section 3229, there would have been doubt as to the liability compromise since the deductibility of the bonuses and reserve were at issue. See 278 U.S. at 289.

²⁴ See 16 Op. Att'y Gen. at 250 ("The authority conferred by Revised Statutes, section 3229, to compromise a case arising under the internal-revenue laws, does not permit the voluntary relinquishment of a part of a tax lawfully assessed upon and due from a solvent person or corporation.").

²⁵ Rev. Rul. 20-1006, 2 C.B. 178 (1920) ("The Commissioner of Internal Revenue has no power under the provisions of section 3229 . . . to compromise taxes legally due from a solvent taxpayer.").

As an example of an early high profile compromise based on the Collectability Standard, in the mid-1920s, the taxpayer, Atlantic Gulf and West Indies Steamship Corporation offered approximately \$2.6 million to compromise an outstanding liability in excess of \$9 million.²⁶ In considering the Offer, the Service's investigation of Atlantic Gulf's financial condition revealed that the value of its assets, less mortgages superior to the government's claims, would not be nearly sufficient to pay the liability in full.²⁷ Additionally, the Service determined that aggressive collection action pursued against Atlantic Gulf might force the company into bankruptcy; and, thus, potentially result in no funds being collected by the government.²⁸ In explaining the Service's rationale for accepting Atlantic Gulf's Offer, Secretary of the Treasury Andrew W. Mellon stated: "The situation was, therefore, similar to any other compromise between a creditor and a debtor having many debts and few assets. . . . If the United States had insisted on its strict legal rights it might well have got nothing."²⁹

2. Attorney General Deviated From Collectability Standard and Approved Financial Hardship as a Basis to Compromise Penalties and Interest

In addition to the underlying tax, the assessment of excessive penalties and interest might double or even triple the amount of the overall liability and cause even a solvent taxpayer to suffer severe financial hardship. Yet, similar to the underlying tax liability, the strict application of the Collectability Standard would not permit the Service to compromise penalties and interest assessed against a solvent taxpayer. For that reason, in 1919, the Service requested the Attorney General's approval to allow it to consider a taxpayer's financial hardship in the interest of "justice,

²⁶ *Ask Couzens To Pay \$10,000,000 In Taxes; He Charges Revenge*, N.Y. TIMES, Mar. 10, 1925, at 1, 6.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* (The Offer was funded by the proceeds of a bank loan and the satisfaction of a judgment in Atlantic Gulf's favor.).

equity, and public policy"³⁰ as a basis for compromising a taxpayer's liability for penalties and interest (Penalty Hardship Standard).

Notwithstanding the absence of any specific language in section 3229 suggesting that a more lenient standard applied to compromise penalties and interest, the Attorney General ruled the Service's authority to compromise those assessments was much broader than its authority to compromise the underlying tax liability.³¹ Accordingly, the Attorney General ruled that this broader authority could be invoked if the best interests of the United States would be served by exercising leniency in compromising "penalties resulting from accident, negligence, or technical omission, . . ." ³² Implicit in this rationale was the notion that penalties as compared to taxes were punitive in nature so that the interests of the United States in enforcing penalties were not purely monetary. Therefore, if the monetary severity of the penalty outweighed the culpability of the taxpayer, even the liability of a solvent taxpayer could be compromised by the Service.³³

3. An Attorney General Opinion Ruling the Collectability Standard Was to Be Applied to Compromises of Tax, Penalties and Interest Marked the End of the Penalty Hardship Standard

Although the word "solvent" had never been defined in any Attorney General opinion or treasury regulation, it was clear that a taxpayer who was financially insolvent was not necessarily insolvent for purposes of the Collectability Standard. So, although a taxpayer would be financially insolvent if the sum of her liabilities (including delinquent tax) exceeded the value of her assets, the Service would nonetheless deem the taxpayer to be "solvent" for tax collection purposes if the value of her assets exceeded the sum of her liabilities with priority over the tax

³⁰ Compromise of Penalties Arising Under Income-Tax Laws, 31 Op. Att'y Gen. 459, 460 (1919).

³¹ *Id.* at 460-62.

³² *Id.* at 463.

³³ See, e.g., Treas. Reg. 33, art. 54 (1918) (in which the Service adopted the Attorney General's ruling).

liability owing to the government. In other words, the taxpayer was expected to liquidate a sufficient amount of unencumbered assets to pay her tax liability to the exclusion of the inferior obligations she owed to her other creditors. Unfortunately, after paying off the government, the taxpayer's inability to pay her general creditors could lead to financial ruin including the destruction of her business. Moreover, workers who the taxpayer employed would be added to the unemployment rolls.

In 1933, because of the Great Depression, this scenario was not uncommon, the acting Secretary of the Treasury, Dean Acheson, asked the Attorney General to permit the Service to deviate from the Collectability Standard under the following circumstances:³⁴ First, to allow the Service to compromise the tax liability and the six percent interest assessed against financially insolvent taxpayers who might be forced out of business if compelled to pay the liability in full;³⁵ second, to allow the Service to compromise penalties and the onerous twelve percent interest assessed against any taxpayer "wherever justice, equity, or public policy seem[ed] to justify the compromise, . . ."³⁶ Although Acheson did not articulate any specific standard to be implemented in the consideration of either compromise, he did advocate that a more "liberal" standard be applied to compromise penalties and excessive interest than would be applied to the compromise of tax and reasonable interest.³⁷ Without specifically referencing the Penalty Hardship Standard, Acheson's position was consistent with its rationale that enforcing penalties was more punitive than monetary; and, thus, warranted a more liberal acceptance policy.³⁸

In an opinion dated October 24, 1933, the Attorney General denied Acheson's request on all counts.³⁹ First, the Attorney General ruled that there were no circumstances that would justify the Service to deviate from the long standing Collectability

³⁴ Rev. Rul. 47-7137, 13-2 C.B. 441 (1934).

³⁵ *Id.*

³⁶ *Id.* at 442.

³⁷ *Id.*

³⁸ *Compromise of Penalties Arising Under Income-Tax Laws*, 31 Op. Att'y Gen. 459 (1919).

³⁹ *Compromise of Claims Under §§ 3469 and 3229 of the Revised Statutes*, 38 Op. Att'y Gen. 94 (1933); see Rev. Rul. 47-7138, 13-2 C.B. 441 (1934).

Standard to compromise the liability of a financially insolvent taxpayer capable of paying it in full.⁴⁰ While acknowledging the potential benefits of a hardship compromise standard, the Attorney General believed that any modification of the Collectability Standard should be made by Congress.⁴¹

In addressing the issue of compromising penalties separately, the Attorney General renounced the application of a more liberal rule based on his perception of congressional intent. The opinion noted that Congress had once enacted a statute (section 5293) that had granted the Service limited authority to compromise penalties up to a relatively small amount.⁴² In 1922, however, Congress repealed the statute and has never since restored the Service's authority.⁴³ So by inference, the Attorney General concluded that Congress would have never intended section 3229 to grant the Service unlimited authority to compromise penalties of potentially much greater amounts.⁴⁴

Finally, the Attorney General also ruled that the interest component of an overall liability could not be compromised separately from the underlying tax.⁴⁵ In support of this position, the Attorney General cited numerous statutes providing that interest was to be collected as part of the tax; and, thus, as a single tax liability.⁴⁶ For that reason, the Attorney General concluded, "that the tax and interest constitute[d] one liability which goes to make up a 'case' arising under the internal revenue laws within the meaning of section 3229."⁴⁷

4. High Ranking Treasury Officials Echoed Attorney General's Rejection of a Compromise Standard Based On Economic Hardship

Apparently, the views of Acheson regarding an economic hardship compromise policy were not shared by other

⁴⁰ Rev. Rul. 47-7138, 13-2 C.B. 442, 443 (1934).

⁴¹ Rev. Rul. 47-7136, 13-2 C.B. at 443.

⁴² *Id.*

⁴³ *Id.* at 444.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 444 n.1.

⁴⁷ *Id.* at 444.

contemporary, high-ranking treasury officials. For example, in 1934, future Supreme Court Justice Robert H. Jackson, then Assistant General Counsel of the U.S. Treasury Department, defended restrictive compromise standards.⁴⁸ In Jackson's view, collection of outstanding taxes in full was the highest congressional objective as evidenced by federal bankruptcy law granting priority status of tax liability over the claims of the taxpayer's general creditors, in addition to being non-dischargeable in bankruptcy.⁴⁹ Additionally, Jackson dismissed pleas that the Service should take into account financial hardship to preserve a taxpayer's ongoing business and continue to employ workers as an excuse for not setting "aside reserves to pay income tax."⁵⁰ Finally, Jackson asserted that a compromise standard based on financial hardship would be impossible to administer and potentially lead to favoritism among taxpayers; and, thus, discriminate against those taxpayers who paid their tax liabilities in full.⁵¹

The views of Jackson and the Attorney General were echoed by Arthur H. Kent, Assistant to the Assistant General Counsel for the Bureau of Internal Revenue.⁵² As to the Service's role in administering tax law, Kent stated:

It is the duty of [tax] administrators to collect, so far as it is possible, the taxes which the Congress has imposed and to which the Government is found under the law to be entitled. Save for the limited power of compromise, no power to forgive a tax obligation exists in any Treasury official.

. . .

⁴⁸ See Robert H. Jackson, Assistant Gen. Counsel, U.S. Treas. Dep't, Changes in Treasury Tax Policy, Address Before the Ninth Annual Meeting of the Federation of Bar Associations of Western New York at Niagara Falls, N.Y. (June 30, 1934), in 12 TAX MAG. 342 (1934).

⁴⁹ *Id.* at 344.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Arthur H. Kent, Assistant to the Assistant Gen. Counsel, Bureau of Internal Revenue, The Treasury Point of View Relative to Some of the Current Problems of Federal Tax Law, Address Before the Tax Clinic at the American Bar Association Meeting at L.A., Cal. (July 17, 1935), in 13 TAX MAG. 511 (1935).

So far as inequities and hardships may be due to imperfections in the revenue laws themselves, there is little, if anything, which the [Service] can do about it, beyond bringing such imperfections through proper channels to the attention of the Congress and advising as to ways and means for their correction.⁵³

In further elaborating on the limited power of the Service to compromise, Kent viewed tax administrators as "fiduciaries" obligated to protect the revenues of the government.⁵⁴ Thus, regardless of the harsh financial plight of some delinquent taxpayers, it was not within the Service's discretion "to barter or give away tax claims of the Government"⁵⁵ Similar to Jackson's views, Kent believed that a compromise based on financial hardship "in the absence of fairly precise legislative standards and criteria, would be fraught with serious dangers of favoritism, special influence, and other abuses."⁵⁶ In other words, a compromise standard that rewarded non-compliance by allowing delinquent taxpayers to pay less than compliant ones would undermine the viability and integrity of the tax system.⁵⁷

5. Did an Executive Order and Two 1934 Attorney General Opinions Grant the Attorney General Exclusive Compromise Authority with Greater Discretion to Approve Offers in Cases Referred to the Department of Justice?

a. The Attorney General Opinions and the Executive Order

Although section 3229 granted pre-litigation compromise authority exclusively to the Service, once a suit was commenced, the recommendation of the Attorney General was also required. Prior to 1934, however, none of the Attorney General opinions

⁵³ *Id.* at 511-12.

⁵⁴ *Id.* at 512.

⁵⁵ *Id.* at 512.

⁵⁶ *Id.* at 513.

⁵⁷ In the same vein, Wright Matthews, Assistant to the Commissioner, explained the dangers of a liberal compromise policy stating: "If the government were to waive its claims simply because the taxpayer had been negligent in not making provision to meet them when the money was in hand, it would place a premium on such ill-advised procedure and the only possible result would be confusion." *Only 5% of Payers Balk at Income Tax*, N.Y. TIMES, Aug. 19, 1935.

suggested that once a case was referred to the Department of Justice (DOJ), the Attorney General's jurisdiction was exclusive or that his discretion to accept Offers was any broader than the Service's limited authority to compromise. Two 1934 Attorney General opinions suggested otherwise.

The first opinion was in response to an inquiry by Secretary of the Treasury, Henry Morgenthau, Jr., requesting further clarification of the Collectability Standard.⁵⁸ Although Morgenthau did not raise the issue, the opinion proclaimed the Attorney General had exclusive authority to compromise a tax case once it had been referred to the DOJ.⁵⁹ Specifically, the Attorney General opinion cited section 5 of Executive Order No. 6166, of June 10, 1933⁶⁰ in which the president had granted the Attorney General with the exclusive jurisdiction to prosecute government claims.⁶¹

In direct response to Morgenthau's question, the opinion reaffirmed the rigidity of the Collectability Standard as it applied to the Service and asserted that there was "no statutory authority to compromise *solely* upon the ground that a hard case is presented, which excites sympathy or is merely appealing from the standpoint of equity, but the power to compromise clearly authorizes the settlement of any case about which uncertainty exists as to liability or collection."⁶² Yet, as to the authority of the Attorney General, the opinion asserted that he was not bound by the Collectability Standard because his discretionary authority to compromise tax cases was much broader than the Service's authority.⁶³ In support of the Attorney General's broader authority to settle disputes, the opinion cited an array of cases, statutes, etc. to that effect⁶⁴ and stated:

[W]hether attaching to the office or conferred by statute or Executive order, to be exercised with wise discretion and

⁵⁸ Compromise of Claims Under §§ 3469 and 3229 of the Revised Statutes—Power of the Att'y Gen. in Matters of Compromise, 38 Op. Att'y Gen. 98 (1934), Rev. Rul. 47-7137, 13-2 C.B. 441, 445 (1934).

⁵⁹ *Id.*

⁶⁰ 38 Op. Att'y Gen. at 99; 13-2 C.B. at 446.

⁶¹ 13-2 C.B. at 448.

⁶² *Id.* at 446 (emphasis in the original).

⁶³ *Id.* at 446-48.

⁶⁴ *Id.* at 447-48.

resorted to only to promote the Government's best interest or to prevent flagrant injustice, but that it is broad and plenary may be asserted with equal assurance, and it attaches, of course, immediately upon the receipt of a case in the Department of Justice, . . .⁶⁵

Thus, in contrast to the rigidity of the Collectability Standard as a limitation of the Service's compromise authority, the words "flagrant injustice" indicated that the Attorney General possessed the discretion to compromise a tax case in "situations in which the enforced collection of the full liability would close down a business which employs a large number of persons, some of whom thereupon would become charges on the community."⁶⁶ In other words, the very hardship standard the Service was not permitted to consider in comprising tax cases prior to their referral to the DOJ could be invoked by the Attorney General once they were within his exclusive jurisdiction.

The second opinion reiterated the exclusivity of the Attorney General's jurisdiction⁶⁷ and much broader discretionary authority to compromise any tax case referred to the DOJ.⁶⁸ At first blush, the Attorney General's assertions of superior authority could have led to the development of a dysfunctional working relationship between the Service and the Attorney General. Moreover, taxpayers might have been inclined to seek ways to bypass dealing with the Service to pursue a potentially more favorable compromise with the Attorney General. As discussed *infra*, it did not appear that the Attorney General opinions or the executive

⁶⁵ *Id.* 448.

⁶⁶ Abbott M. Sellers, *Disposing of Federal Tax Litigation—Extra-Judicially*, 1 S.C. L.Q. 76, 83 (1948) (Sellers, the Attorney in Charge, Compromise Section, Tax Division, Department of Justice, explained the circumstances under which the Attorney General was empowered to compromise a tax case to prevent a flagrant injustice.).

⁶⁷ Power of the Att'y Gen. in Matters of Compromise, 38 Op. Att'y Gen. 124 (1934); Op. Att'y Gen. 10-7359, 14-1 C.B. 442 (1934).

⁶⁸ As to the scope of the Executive Order cited in the first Attorney General opinion, the opinion stated: "It merely withdrew from all other officers such power and authority as the theretofore held, leaving the Attorney General in plenary control of any case once it has been referred to the Department of Justice." 14-1 C.B. at 442-43. As to the Attorney General's broad authority to compromise, the opinion stated: "He may dismiss a suit or abandon defense at any stage when in his sound professional discretion it is meet and proper to do so. It follows that he may compromise any case on such terms as he sees fit, . . ." *Id.* at 443.

order, however, were ever implemented in a way that created a double compromise standard or had a negative impact on the working relationship between the Attorney General and the Service.

b. The Attorney General Opinions and Executive Order did not Deter the Attorney General and the Service from Working Together in Unison After Tax Cases were Referred to the Department of Justice

From all indications, in spite of the implications from the Attorney General opinions and the executive order to the contrary, the Service and the Attorney General worked in unison after a tax case was referred to the DOJ. A portent of the spirit of cooperation was indicated in the last paragraph of the second Attorney General opinion as follows:

I do not understand that it was intended by Executive Order No. 6166 that the combined efforts of both departments might not be availed of where it would be beneficial to the United States I also feel, . . . that it would be not only highly desirable but most helpful to continue to receive the views and recommendations of [the Service]. After all, both departments are serving the same interests and have a common end in view.⁶⁹

The Attorney General's message of cooperation between the DOJ and the Service was echoed by Samuel O. Clark, Jr., an Assistant Attorney General during the years following the issuance of the opinion. Noting the DOJ's close working relationship with the Service, Clark explained that Offers submitted to the DOJ were routinely referred to the Service for the recommendation of the chief counsel.⁷⁰ Similarly, a contemporary high-ranking attorney in the collection section, tax division, and DOJ described the relationship between the Service and the DOJ as follows:

⁶⁹ *Id.* at 444.

⁷⁰ Samuel O. Clark, Jr., Assistant Att'y Gen., Tax Compromises in the Department of Justice—Some Aspects of Procedure and Policy, Address Before the Tenth Tax Clinic of the Section of Taxation of the American Bar Association, at Hotel Mayflower, Wash., D.C. (Mar. 23, 1940), in 18 TAXES 280, 282 (1940).

[B]efore action is taken on any [Offer] the Tax Division [of the DOJ] invariably solicits the views of the [Service], which occupies a relationship to the Justice Department akin to that of client to attorney. It is not often that a firm recommendation by the [Service] will be overridden; much importance is attributed to the views of its experienced staff of attorneys, investigating agents, engineers and accountants.⁷¹

c. Attorney General Adhered to the Collectability Standard in His Consideration of Offers Submitted to the DOJ

Statements made by Clark indicating the Attorney General's reluctance to compromise a tax case based on economic hardship suggested that the Collectability Standard was applied by the Attorney General in the same way it was applied by the Service. To that end, Clark asserted that compromises proposed on the basis of economic hardship were rare and invariably rejected.⁷² Only under extraordinary circumstances in which a lump sum payment of the tax liability would cause the taxpayer to go into bankruptcy or suffer an irreparable adversity would such an Offer be considered.⁷³ Yet, even in those cases, Clark asserted that the DOJ would go no further than accept installment payments of the amount offered in compromise plus interest and collateral pledged by the taxpayer.⁷⁴

Thus, in spite of the two Attorney General opinions and the executive order, it appeared that the Attorney General and the Service applied uniform Offer standards and worked closely together in considering Offers submitted under the jurisdiction of the DOJ. This was a sound practice as it would have been imprudent for a taxpayer to believe she could compromise a better deal with the Attorney General than she could with the Service.

C. The Commissioner's Statement of Policy with Respect to the Compromise of Taxes, Interest, and Penalties Dated July 2,

⁷¹ Sellers, *supra* note 66, at 79.

⁷² Clark, *supra* note 70, at 281.

⁷³ *Id.*

⁷⁴ *Id.*

*1934, Established Maximum Collection Amount as the Baseline
for an Acceptable Offer*

In 1934, Commissioner Guy T. Helvering realized that the Attorney General opinions provided no specific guidelines as to how to determine whether there was doubt as to a taxpayer's financial ability to pay her tax liability in full; and, if so, how to ascertain the amount of a viable Offer.⁷⁵ In order to fill the void, at least to some extent, Helvering issued the Commissioner's Statement of Policy with Respect to the Compromise of Taxes, Interest, and Penalties, dated July 2, 1934 (Commissioner's 1934 Compromise Policy Statement).⁷⁶ In clarifying the meaning of "doubt of collectability," the statement declared that it could not be a mere possibility of doubt, but rather real and substantial as supported by credible financial documentation submitted by the taxpayer.⁷⁷ Additionally, the statement established the baseline amount of a viable Offer to be the maximum amount the taxpayer was capable of paying based on the value of the net equity of her assets as well as both current and future income (Maximum Collection Amount).⁷⁸

Although the Commissioner's 1934 Compromise Policy Statement referred to "current and future income" as a financial resource available to the taxpayer, it failed to explain how that component of the equation was to be quantitatively factored into the consideration mix of a viable Offer. As a result, the Offer process remained shrouded in uncertainty until 1992 when the Service finally created a quantitative formula of the income component to be used in the computation of an acceptable Offer amount.⁷⁹ Perhaps, as discussed *infra*, the lack of a quantitative formula was a portent of corruption in the implementation of Offer policy that would taint the integrity of the Service during the 1950s.

II. CONGRESSIONAL INVESTIGATIONS OF CORRUPTION IN THE SERVICE IN THE EARLY 1950S LED TO TRANSPARENCY OF OFFER

⁷⁵ See T.D. 8829, 64 Fed. Reg. 39020, 39021 (July 21, 1999).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See *infra* Section IV.B.1.a.ii.

ACCEPTANCES AND OTHER CHANGES IN THE OFFER APPROVAL
PROCESS*A. President Truman Yielded to Congressional Pressure and
Issued an Executive Order Directing Accepted Offers be Open to
Public Inspection*

If there was any question of Congress's endorsement of the rigid adherence to the Collectability Standard as a prerequisite for the acceptance of Offers, a congressional investigation into corruption in the Service was indicative of its full support. In 1951, Denis W. Delaney, an Internal Revenue Collector (Collector) was indicted for receiving bribes or "fees" from taxpayers seeking to compromise outstanding tax liabilities.⁸⁰ The wrongdoings of Delaney and other tax officials triggered the creation of a House Ways and Means subcommittee to investigate "corruption" in the Service.⁸¹

On the Senate side, Senator John J. Williams launched his own investigation revealing that the Service had accepted Offers from racketeers and politically connected individuals on terms that were arguably more generous than Offers submitted by average taxpayers.⁸² To illustrate his point, Williams noted a case in which the Service accepted an Offer of \$850,000 to compromise a tax liability of \$38 million, or three percent of the liability submitted by a taxpayer with political connections.⁸³ Also, Williams questioned the integrity of the Service's overly generous compromises of "at least forty-eight tax cases of more than \$250,000 each over the last ten years [including the settlement of] a \$888,021 claim for a mere \$1,000."⁸⁴

⁸⁰ See *Delaney Must Stand Trial*, N.Y. TIMES, Nov. 21, 1951, at 23.

⁸¹ See *House Group to Sift Tax Bureau Charges*, N.Y. TIMES, July 29, 1951. The scandal resulted in the resignation of the assistant commissioner in charge of operations, the chief counsel, the assistant attorney general in charge of the tax division of the Department of Justice, and nine of the sixty-four internal revenue collectors. Of the latter group, three were criminally prosecuted. See Bryan T. Camp, *Theory and Practice in Tax Administration*, 29 VA. TAX REV. 227, 241 (2009).

⁸² See Frank O'Brien, *Commissioner Says Collectors Getting All Possible Taxes*, BIG SPRING WKLY. HERALD, Aug. 15, 1952, at 1.

⁸³ *Williams Says 38 Million Tax Case Settled for 3% With Boyd Aid; New Charge Made in Tax Scandals*, N.Y. TIMES, June 27, 1952, at 1.

⁸⁴ *Williams Assails Tax Compromises*, N.Y. TIMES, July 3, 1952.

Contemporaneously, the American Society of Newspaper Editors' Freedom of Information Committee (ASNE) also voiced its concern about the Service's preferential treatment of certain high profile taxpayers in its acceptance of Offers.⁸⁵ Eventually, succumbing to pressure from Congress and ASNE to become more transparent in explaining the Service's rationale for accepting Offers, Commissioner John B. Dunlap announced "details of tax compromises would be disclosed whenever a case was challenged in Congress."⁸⁶ In a telegram to Dunlap, however, James S. Pope (editor of the Louisville Courier-Journal), speaking on behalf of ASNE, expressed dissatisfaction that the promised disclosure would not go far enough, stating:

When the revenue bureau settles a tax case for a few cents on the dollar, the people who pay in full are entitled to know of it, . . . Yet under your new policy these transactions would remain secret if the bureau can keep them secret. The people have no FBI of their own to ferret out the names of favored tax evaders.⁸⁷

Finally, on August 20, 1952, President Truman issued Executive Order 10386 directing the Service to open for public inspection any accepted Offer including schedules or other documents relevant to the Offer.⁸⁸ Issued on the same day, a treasury decision approved by President Truman provided the specific details.⁸⁹ For each Offer accepted on or after August 20, 1952, a copy of the summary sheet (abstract) setting forth a brief explanation of the reasons for the approval would be made available for public inspection in the office of the information officer of the Service.⁹⁰ Upon further request, the specific information attached to the summary statement, or the statement itself, would also be made available to the public.⁹¹ As to Offers accepted before August 20, 1952, no summary sheets were to be

⁸⁵ See O'Brien, *supra* note 82.

⁸⁶ *Id.*

⁸⁷ *Id.* (internal quotation marks omitted).

⁸⁸ Exec. Order No. 10386, 1952-2 C.B. 299 (1952).

⁸⁹ I.R. Mimeo. 26, 1952-2 C.B. 299, 299-300 (1952).

⁹⁰ *Id.* at 300.

⁹¹ *Id.*

made available for public inspection unless a "request identifying the taxpayer" whose Offer was accepted was submitted.⁹²

B. Public Disclosure of Accepted Offer Details Revealed Service Bias and Incompetency in Processing Offers

Although the executive order did not require the Service to do so, within days after its issuance, the Service voluntarily released the details of two groups of Offers it had accepted prior to August 20, 1952. As well meaning as this gesture of transparency might have been, the revelations reflected poorly on the Service. The first group of disclosures involved Offers submitted by two disreputable profile taxpayers, one a gangster and the other a corrupt political lieutenant.⁹³ The second group included the Service's acceptance, over the recommendation of rejection by the examiner of an Offer of \$2600 to compromise a liability of \$15,500.⁹⁴ In that case, the investigating examiner disapproved of the Offer because the taxpayer "did not make any sincere effort to pay off any part of this tax liability and [since 1945] she lived somewhat beyond her means."⁹⁵ On her wages as a part-time worker in a shoe factory, while not paying her taxes, the taxpayer paid for her two children to go to summer camp and purchased two fur coats.⁹⁶ Yet, inexplicably, the Service accepted the taxpayer's Offer.⁹⁷

These revelations of apparently preferential or overgenerous settlements of substantial tax liability further tainted the integrity of the Offer process. In a defensive response to innuendos of improper compromises, Commissioner Dunlap stated:

⁹² *Id.*

⁹³ See *Guzik Paid \$100,000 of \$890,000 Taxes; In Opening Settlement Files, Bureau Reveals Capone Aide had First Offered \$5,000*, N.Y. TIMES, Aug. 29, 1952. In 1942, the Service accepted the Offer of John Guzik, the former treasurer of Al Capone's gang. The other high profile Offer was made by the estate of William D. Boyle once a lieutenant in Kansas City's Pendergast machine whose tax liability was attributed to embezzled money.

⁹⁴ *\$140,000 Tax Cases Settled For \$15,500: Woman Who 'Lived Beyond Means' Among 2d Group of 'Compromises' Disclosed*, N.Y. TIMES, Aug. 30, 1952.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

The law says the [Service] can compromise tax liabilities and that's all we do When a taxpayer goes bankrupt or into receivership, the Government does not forgive his tax liability. It merely settles on a cold-blooded business basis by taking every dime the taxpayer's net worth reveals he has. If it shows he has assets of \$5,000, the Government takes the \$5,000.⁹⁸

Arguably the most embarrassing Offer the Service accepted from a high profile taxpayer was submitted by Ethel Barrymore, a famous Hollywood and Broadway actress. In 1937, the Service accepted her Offer of \$7500 to compromise a tax and interest liability of approximately \$99,000,⁹⁹ based on the determination that at the age of "about 61," she was "broke" and had "no future on the stage."¹⁰⁰ Apparently, the Service underestimated the actress's future earning capacity as she subsequently revitalized her acting career by starring in a successful play with a three year run as well as in numerous Hollywood films.¹⁰¹

Obviously, the Service would have collected more; if not the entire underlying liability if it had the foresight to tap into Barrymore's future earnings. As a result of this embarrassing oversight, the Service subsequently developed a policy of insisting on a future income collateral agreement when the amount offered was small in proportion to the underlying tax liability.¹⁰² As discussed in more detail *infra*, in addition to any amount paid with the Offer, pursuant to a future income collateral agreement, the taxpayer must pay an amount equal to a certain percentage of future earnings over a certain base amount retained by the taxpayer to pay living expenses.¹⁰³ So, if and when the taxpayer's financial condition improved, more of the compromised tax would be recouped from the taxpayer's additional collateral agreement payments.

⁹⁸ *Dunlap Very 'Tired' of Tax Innuendos*, N.Y. TIMES, Sept. 5, 1952.

⁹⁹ *U.S. Erred \$90,000 on Actress' Future*, N.Y. TIMES, Sept. 21, 1952.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See Urban C. Bergbauer, Jr., *Offers in Compromise—Their Use and Justification*, 35 TAXES 301, 305 (1957).

¹⁰³ See *infra* notes 124, 156-163 and accompanying text for a discussion of future income collateral agreements.

*C. Overhaul of the Service Pursuant to Reorganization Plan No.
1 Resulted in a More Streamlined Offer Process*

In the early 1950s, corruption and ineptitude by the Service were not the only problems in the Offer process. In addition, the tedious red tape beginning with the submission of an Offer through its final acceptance was unduly cumbersome. Even an Offer compromising a minimal underlying tax liability required multiple reviews, high level approvals, and a legal opinion prepared by the chief counsel. The process would begin with the taxpayer's submission of an Offer in the appropriate local office of the Collector.¹⁰⁴ If the compromised liability was less than \$1000, and did not include a fraud penalty, the Collector would make the initial investigation to determine whether the taxpayer had the ability to pay the liability in full.¹⁰⁵ Next, the Collector would send a report recommending approval or rejection of the Offer to the local staff division office. If the staff division head recommended acceptance, he would initial a form letter to be sent to the Secretary of the Treasury.¹⁰⁶ From the Secretary of the Treasury's office, the case would be transferred to division counsel for further review. If division counsel approved the Offer, he would initial a memorandum and send the case file to the Commissioner's office for yet another review. If the Commissioner approved, he would recommend the Offer for acceptance by the Secretary of the Treasury. From there, the case file would be sent to the chief counsel who was responsible for drafting the legal opinion. If the chief counsel approved, the case file would be reviewed by an assistant to the general counsel of the treasury department. Finally, if the general counsel approved the Offer, the case file would be sent back to the Secretary of the Treasury for final formal approval.¹⁰⁷

¹⁰⁴ Treas. Reg. § 601.4(c)(1) (1949). There were sixty-four collectors throughout the United States. See Camp, *supra* note 81, at 241.

¹⁰⁵ See Daniel S. Berman & Joseph Berman, *Closing Agreements and Compromises Under the New Policy of the Internal Revenue Board*, 25 MISS. L.J. 236, 239 (1954) (If the compromised tax was more than \$1000 or included a fraud penalty, an agent would conduct the investigation.).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Fortunately, pursuant to the Reorganization Plan No. 1 of 1952 (Reorganization Plan) much needed changes to the Offer process were made as a result of the decentralizing and reorganizing of the functions and offices of the Service.¹⁰⁸ As fully implemented, the country was divided into nine geographical regions and sixty-four districts.¹⁰⁹ The positions of collectors were replaced by district directors¹¹⁰ who were placed in charge of each district in which they assumed the responsibility of all functions of tax administration.¹¹¹

Subsequently, the Service issued Revenue Ruling 117¹¹² delegating "certain duties, functions, and responsibilities with respect to the processing and disposition of offers in compromise"¹¹³ to the district directors. Part of the delegation included granting the district director full authority to accept Offers compromising liabilities of less than \$500 (including tax, penalties, and interest) without any further review or approval by the Commissioner or the Secretary of the Treasury or a formal legal opinion prepared by the chief counsel.¹¹⁴ If the district director accepted such an Offer, he would prepare an abstract and statement explaining his reasons for endorsing the Offer that would serve as the statutorily required legal opinion.¹¹⁵

As to Offers of compromising liabilities of \$500 or more, the district director's authority was limited to recommending such Offers for approval. Similar to the less than \$500 Offers, the district director would prepare "an appropriate schedule and abstract and statement"¹¹⁶ explaining his reasons for

¹⁰⁸ Approved by Congress, the Reorganization Plan was proposed by President Truman under the authority of the Reorganization Act of 1949, Pub. L. No. 109, 63 Stat. 203.

¹⁰⁹ Camp, *supra* note 81, at 242.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² 1953-1 C.B. 498 (1953).

¹¹³ *Id.* at 499.

¹¹⁴ *Id.* at 502.

¹¹⁵ *Id.* When Congress re-designated section 3761 of the Internal Revenue Code to section 7122, pursuant to the 1954 re-codification of the Code, the new section 7122 eliminated the requirement of a legal opinion with regard to the compromise of tax, penalties, and interest of less than \$500. Internal Revenue Code of 1954, Pub. L. No. 83-591, 68 Stat. 730.

¹¹⁶ 1953-1 C.B. at 502.

recommending the Offer and forward the entire compromise file to the Commissioner for final approval.¹¹⁷

Thus, Revenue Ruling 117 implemented a significant first step in streamlining the Offer process by granting the district director full autonomy to approve Offers of liabilities of less than \$500 as well as eliminating cumbersome red tape with respect to all other Offers. Subsequently, perhaps to deal with a backlog of Offers, effective December 2, 1955, pursuant to Delegation Order No. 11, the Service further expanded the district director's authority to accept Offers of compromised liabilities of less than \$5000.¹¹⁸

Shortly thereafter, however, Revenue Procedure 56-26 cut back the district director's authority with regard to Offers compromising liabilities greater than \$500 and less than \$5000.¹¹⁹ For those Offers, the district director no longer had the authority to accept; and, instead, was required to send his recommendation of approval to the appropriate regional counsel for final acceptance.¹²⁰ Although a better policy might have been to allow the district director to retain the authority to accept all Offers compromising liabilities of less than \$5000, delegating the authority previously held exclusively by the Commissioner and the Secretary of the Treasury to the regional counsel was nonetheless an improvement.

III. SERVICE'S OFFER POLICY: 1953-1992

A. Case Study Models of the Offer Review Process Published in Revenue Ruling 117 Provided Little Insight of How to Factor Present and Future Income into the Computation of the Maximum Collection Amount

For the first time since the Commissioner's 1934 Policy Statement, perhaps due in part to the public disclosure of the Service's acceptance of questionable Offers, Revenue Ruling 117

¹¹⁷ *Id.* Although not articulated in the revenue ruling, it appeared that if the Commissioner approved the Offer, the district director's abstract and statement would serve as the statutorily required legal opinion.

¹¹⁸ 1956-1 C.B. 1010 (1956).

¹¹⁹ 1956-2 C.B. 1383 (1956).

¹²⁰ *Id.* at 1385.

included case study models to illustrate the process by which Offers were to be evaluated by the district director.¹²¹ Specifically, Exhibit A¹²² and Exhibit F¹²³ provided the analysis and rationale for the rejection and acceptance of an Offer, respectively. Unfortunately, although somewhat helpful, neither case study provided any meaningful insight as to how to quantify the present and future income component of the Maximum Collection Amount in determining the amount of a viable Offer.

In Exhibit A, a taxpayer corporation submitted an IRS Form 656 (Offer in Compromise) offering a lump sum of \$10,000 to compromise a tax liability of \$32,000. On IRS Form 433 (Collection Information Statement), the taxpayer set forth a detailed disclosure of its financial condition including a list of assets and liabilities. From a balance sheet perspective, the taxpayer was financially insolvent because the total amount of its liabilities (including non-tax related liabilities) exceeded the total value of its assets whether valued at book value, fair market value, or forced sale value. Yet, despite the taxpayer's financial insolvency, the projected proceeds of a hypothetical liquidation of the taxpayer's unencumbered assets at the forced sale value (the lowest valuation) would satisfy the tax liability in full. Consequently, because collectability was not in doubt, there was no reason to consider the taxpayer's present and future income as a collection resource. For that reason, the district director rejected the Offer.

In Exhibit F, an individual taxpayer who was the president of a stock brokerage company submitted an IRS Form 656-C to make a deferred installment payment Offer in the principal amount of \$5000 to compromise a liability of approximately \$13,000. The payment terms were as follows: A down payment of \$1000 with the balance of \$4000 payable in installments of \$500 plus six percent interest (accruing on the unpaid balance of the Offer) every six months for a period spanning four and a half years. Also, the taxpayer executed a future income collateral agreement agreeing to make additional payments of twenty percent of his annual income in excess of \$7500, but not more than \$10,000;

¹²¹ See 1953-1 C.B. 498 (1953).

¹²² *Id.* at 507 ex. A.

¹²³ *Id.* at 514 ex. F.

thirty percent of his annual income in excess of \$10,000, but not more than \$15,000; and fifty percent of his annual income in excess of \$15,000. Similar to the deferred installment payments, any additional payment would also be subject to six percent interest accruing on the unpaid balance of the Offer. So, if over the four and a half year period, the taxpayer's annual income never exceeded \$7500, the taxpayer would pay no more than the Offer amount of \$5000, i.e., the sum of the down payment plus the deferred installment payments (not including interest). On the other hand, if the taxpayer's annual income exceeded \$7500 in one or more of those years, the additional payment(s) might be sufficient to satisfy the compromised tax liability in full.¹²⁴

Similar to Exhibit A, the district director began his analysis with a thorough evaluation of the taxpayer's financial condition. According to the taxpayer's balance sheet on Form 433, a hypothetical liquidation of the taxpayer's unencumbered assets at the forced sale value would have yielded no more than \$2450, well below the amount of the underlying tax liability. Because recent severe losses incurred by his company resulted in a substantial reduction of the taxpayer's monthly salary, it was unlikely that the amount of his income would increase in the foreseeable future.¹²⁵ Moreover, over the most recent twelve-month period, the taxpayer's receipts (salary, dividends, and loan proceeds) were offset by an equal amount of expenses.¹²⁶

Ultimately, the district director accepted the taxpayer's Offer based on his determination that the \$5000 offered exceeded his net equity by at least \$3000 and provided adequate consideration for his present earning capacity.¹²⁷ Although no explanation for that conclusion was given, perhaps the district director was swayed by the additional payment potential of the future income

¹²⁴ Interestingly, if the Service had insisted Ethel Barrymore execute a similar future income collateral agreement, the amount of her compromised tax liability would have likely been paid in full. See *supra* notes 99-103 and accompanying text.

¹²⁵ 1953-1 C.B. at 518-19.

¹²⁶ *Id.* (Among the taxpayer's expenses were "living expenses" of \$3805 and club dues of \$422.). Although there was no analysis of the living expenses, it was apparent that the district director must have found them to be reasonable. As to club dues, the district director determined it was essential for the taxpayer's business to maintain business contacts "necessitating membership in social clubs and doing considerable entertaining in connection with securing accounts for the firm." *Id.* at 519.

¹²⁷ *Id.*

collateral agreement.¹²⁸ In any event, it was unclear whether the district director would have recommended acceptance of the Offer in the absence of a collateral agreement.

B. Some Offers Mandate Taxpayer Concessions of Certain Tax Benefits

1. Tax Benefit Collateral Agreements

Unlike statutorily granted tax benefits such as certain exclusions from gross income or net operating losses, the Service's decision to accept a taxpayer's Offer to pay an amount less than the outstanding tax liability based on the taxpayer's inability to pay it in full is completely discretionary. Nevertheless, an accepted Offer does confer a tax benefit to the taxpayer to the extent of her tax savings. So, consistent with the Service's goal of collecting the Maximum Collection Amount, it was understandable for the Service to insist that a taxpayer give up certain tax saving benefits otherwise available to her as another means of collecting more of the compromised tax liability.

By analogy, section 108(a) of the Code excludes certain types of discharge of debt income from gross income¹²⁹ with a mandatory corresponding reduction of certain tax attributes that would have provided her with future tax saving benefits.¹³⁰ Similarly, as an offset to the tax savings of an accepted Offer, the Service developed several types of collateral agreements designed to potentially recoup some or all of the compromised tax liability.

Pursuant to a Collateral Agreement—Adjusted Basis of Specific Assets,¹³¹ the basis of certain assets are reduced to quick sale value.¹³² For example, in computing the collection potential of a taxpayer's net equity, an asset with a tax basis of \$100,000, but a quick sale value of \$70,000, would be valued at the latter amount. If the taxpayer were to sell the asset for its quick sale

¹²⁸ *Id.* at 520.

¹²⁹ See I.R.C. § 108(a)(1)(A)-(D) (2006) for the four types of discharge of debt income excluded from gross income.

¹³⁰ See I.R.C. § 108(b)(2)(A)-(G) (2006) for the seven specific tax benefits to be reduced by the amount of the excluded discharge of debt income.

¹³¹ See IRS Form 2261-B (revised Jan. 2012).

¹³² See IRM 57(10)(11).421(1) (Nov. 15, 1985).

value, however, she could potentially recognize a \$30,000 taxable loss.¹³³ So, as a result of the \$30,000 basis reduction, instead of a potential tax loss, the taxpayer's tax liability would be greater than it would have been without the basis reduction.¹³⁴

Likewise, if the asset were depreciable, the basis reduction would eliminate the tax benefit of \$30,000 of cumulative depreciation deductions over the tax life of the asset. Therefore, the taxpayer's tax liability would be correspondingly greater in those tax years. So, in tax years following the tax year of the compromise, by virtue of the additional tax attributable to the lost depreciation deductions, all or some of the compromised liability could be potentially recouped.¹³⁵

Similarly, pursuant to a Collateral Agreement—Waiver of Net Operating Losses and Capital Losses,¹³⁶ the taxpayer would waive the right to claim net operating loss and capital loss carryovers incurred in taxable years before and/or after the year the Offer was accepted.¹³⁷ By waiving the use of those losses to other tax years, the taxpayer's tax liability in those tax years would be correspondingly higher than it would have been with their allowance; and, thus, the additional tax liability would be a recoupment of all or some of the compromised liability.¹³⁸

¹³³ See I.R.C. § 1001(a) (2006).

¹³⁴ This is because the amount realized of \$70,000 less the reduced basis of \$70,000 would result in no gain or loss.

¹³⁵ Under no circumstances would the aggregate of actual payments (exclusive of interest) plus the amount of additional tax paid by the taxpayer attributable to the basis reduction (or any other collateral agreement in effect) exceed the compromised liability, plus interest and penalty that would have accrued in the absence of the compromise. See IRM 57(10)(11).421(2) (Nov. 15, 1985).

¹³⁶ Before they became obsolete, the collateral agreement also included a waiver of unused investment credits.

¹³⁷ See IRM 57(10)(11).43(1) (Nov. 15, 1985).

¹³⁸ Under no circumstances would the aggregate of actual payments (exclusive of interest) plus the amount of additional tax paid by the taxpayer attributable to the waiver of losses (or any other collateral agreement in effect) exceed the compromised liability, plus interest and penalty that would have accrued in the absence of the compromise. See IRM 57(10)(11).421(3). Also, at one time, there was also a collateral agreement to waive disallowed bad debt or other losses. IRM 57(10)(11).44, MT 5700-1 (Nov. 15, 1985).

2. Other Tax Benefit Concessions

Obviously, the collateral agreements described *supra* would be of no consequence to taxpayers who did not have those specific beneficial tax attributes. Over the years, however, certain standard tax benefit concessions applicable to all taxpayers have been incorporated in IRS Form 656 as a means to offset the tax savings of the compromise. Those concessions include the following:

- Waiver of right to receive refunds or credits for all tax years including tax year of compromise up to the difference between the comprised liability and the amount offered.
- Waiver of the statute of limitations on assessment and collection.
- Suspension of the running of the statute of limitations on assessment and collection during the period the Offer is pending.
- Waiver of right to contest validity of the underlying tax liability if the Offer is accepted.
- In the event of default of an accepted Offer, waiver of any statutory restrictions on assessment and collection including the right to receive notice prior to the Service's pursuit of assessment and collection.

Clearly, the above listed tax benefit concessions are consistent with the Service's goal of maximizing collection. For example, by waiving the right to receive refunds and credits, the Service can collect funds that would have otherwise been payable to the taxpayer as a resource from which to recoup all or part of the compromised liability. Obviously, it would make no sense for the Service to on one hand accept the taxpayer's Offer of less than the outstanding liability; and, then on the other hand, issue a refund or credit, or allow the taxpayer to apply it as all or part of the amount offered.

As another example of the virtues of taxpayer concessions, the suspension of the running of the statute of limitations on

collection serves two purposes. One purpose is to deter taxpayers from submitting an Offer as a delay tactic. In other words, if the statute of limitations on collection continued to run during the time the Service was considering the Offer, a taxpayer might be tempted to make an Offer solely to "run out the clock" with the hope that it would expire before the Service rejected or accepted the Offer. If successful, the taxpayer could effectively eliminate her entire tax liability without making any payment. The other purpose is to provide the Service with adequate time to consider the Offer without being concerned that the statute of limitations on collection might run prior to its completion of the Offer process. Otherwise, to protect its collection interests, depending on the time remaining on the statute of limitations, the Service might be inclined to hastily reject an Offer without giving it due consideration.

C. General Public Unawareness of Offer Procedure, the Lack of a Quantitative Formula to Compute the Maximum Collection Amount, and Tedious Hard-to-Monitor Collateral Agreements Stifled Offer Submissions and Acceptances

1. The Salient Details of Offer Policy and Procedure Found Exclusively in the Internal Revenue Manual—A Document Not Available to the General Public

Inexplicably, following the Commissioner's 1934 Policy Statement, Revenue Ruling 117 was the only official publically published document providing any insight into the Service's evaluation of Offers.¹³⁹ In fact, over time, the salient details of Offer policy and procedure were developed exclusively in the Internal Revenue Manual (Manual) a document providing instructions and guidance to be followed by Service personnel in administering tax law.¹⁴⁰ As an internal document, however, the Manual was not available to the general public. So, in the absence of any public pronouncements of Offer policy and procedure (other than Revenue Ruling 117), most taxpayers submitting an Offer

¹³⁹ See *supra* Section III.B. for a detailed discussion of Rev. Rul. 117.

¹⁴⁰ See Archie W. Parnell, Jr., *The Internal Revenue Manual: Its Utility and Legal Effect*, 32 TAX LAW. 687 (1979).

would have no way to ascertain whether their Offers had any chance of being accepted by the Service.

Finally, in 1974, prompted by a Sixth Circuit decision¹⁴¹ ordering the Service to disclose certain portions of the Manual pursuant to section 3(b)(C) of the Freedom of Information Act,¹⁴² the Service voluntarily released the entire Manual to the public.¹⁴³ Yet, as a practical matter, however, the Manual would have been accessible only to those who subscribed to the Commerce Clearing House (CCH) tax service (the company that published the Manual).¹⁴⁴ Since most subscribers were specialized tax practitioners, taxpayers without such representation would likely be unenlightened as to the pertinent Offer policies and procedures. Moreover, Service personnel were directed not to assist uninformed taxpayers and were specifically instructed not to request a taxpayer to submit an Offer or to suggest the specific amount or terms to be included in an Offer.¹⁴⁵

2. Lack of Quantitative Formula to Compute the Maximum Collection Amount

Yet, even a taxpayer who had access to the Manual would be hard pressed to understand the nuances of submitting a viable Offer. Over the years, the lack of clarity in Revenue Ruling 117 in how to integrate the present and future income component of the Maximum Collection Amount had not been rectified in the Manual. An examination of the Manual issued on November 15, 1985 provides insight as to the vagueness of the criteria used by Service personnel in computing the Maximum Collection Amount.

According to the Manual, the computation of the Maximum Collection Amount began with the determination of the taxpayer's net equity in her assets.¹⁴⁶ Net equity was defined as the difference between the quick sale value, less any encumbrances, with priority over the government's tax lien. "Quick sale value" was the estimated proceeds realized from a hypothetical sale to be

¹⁴¹ *Hawkes v. IRS*, 507 F.2d 481 (6th Cir. 1974).

¹⁴² 5 U.S.C. § 552(a)(2)(C) (2006).

¹⁴³ See Parnell, *supra* note 140, at 690.

¹⁴⁴ *Id.*

¹⁴⁵ IRM 57(10)1.5(2)(b) (Nov. 15, 1985).

¹⁴⁶ See IRM 57(10)7.51(3) (Nov. 15, 1985).

consummated as soon as possible due to adverse financial circumstances.¹⁴⁷ Assuming but for a compromise, the taxpayer would face a threat of imminent collection by the Service, the Manual indicated the use of the quick sale value was a compromise between fair market value¹⁴⁸ and forced sale value.¹⁴⁹ In other words, the use of fair market value would not be appropriate because it is unlikely that a distraint sale of the taxpayer's assets would bring that kind of return. Similarly, the use of forced sale value would not reflect any concession by the taxpayer as the net proceeds would reflect the same amount the Service would likely recover from a distraint sale of the taxpayer's assets.¹⁵⁰

In determining quick sale value, the Manual directed Service personnel to consider local conditions such as "availability of mortgage money, appropriateness of the assets to local conditions . . . health of the local economy, etc." that should normally "not be less than 70% of fair market value."¹⁵¹ Although the Manual encouraged open negotiation between the Service and the taxpayer in determining ultimate valuations, setting the quick sale value of a given asset based on those rather vague guidelines was likely to be a contentious issue. In any event, if the taxpayer's net equity was determined to be equal or greater than the outstanding liability, the net realizable proceeds from a hypothetical liquidation would be sufficient to pay it in full so there would be no need to consider the taxpayer's current and future income.

On the other hand, if the taxpayer's net equity was determined to be less than the outstanding liability, then the taxpayer's present and future income would also be evaluated. According to the Manual, however, there was no fixed percentage

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (The Manual defined "fair market value" as the value determined by a willing buyer and willing seller, or the maximum value of any asset.).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See IRM 57(10)7.51(4). In the event it was in the "best interest of the Government," the Service would accept a forced sale valuation of the taxpayer's assets. IRM 57(10)7.51(5). On the other hand, one scholar noted that in his experience revenue officers tended to value assets "much closer to market value" than to quick sale value. Daniel T. Maggs, *Section 7122 of The Internal Revenue Code: The Offer in Compromise*, 11 GONZ. L. REV. 481, 496 (1976).

of a taxpayer's income that had to be considered.¹⁵² Even more problematic in determining a taxpayer's future "income" was the lack of any rules or guidelines for an allowance of some measure of necessary living expenses.¹⁵³ Ultimately, the adequacy of the Offer amount attributable to the taxpayer's income was determined by an examining officer's subjective evaluation of the taxpayer's earning capacity based on "[her] education, profession or trade, age and experience, health, past and present income, and future prospects"¹⁵⁴ So, in the absence of a quantitative formula to determine the monetary value of a taxpayer's current and future income and because Service personnel were not allowed to suggest Offer amounts,¹⁵⁵ a taxpayer had no assurance that the amount offered would be acceptable.

3. Collateral Agreements Were Tedious to Complete and Hard to Monitor

As discussed, *supra*, it was not uncommon for the Service to insist upon the execution of one or more types of collateral agreements to supplement the amount offered by the taxpayer. In some ways, such collateral agreements were potentially beneficial to the Service and the taxpayer. From the Service's prospective, depending on the potential improvement of the taxpayer's financial circumstances, the additional payments collected by the Service might actually satisfy the entire liability including accrued interest and penalties. From the taxpayer's perspective, her willingness to enter into a collateral agreement might entice the Service to accept an otherwise unacceptable Offer; and, unless the taxpayer's financial condition improved, the Service would have no recourse to collect any more of the compromised liability from the taxpayer.

Unfortunately, the devil was in the details as collateral agreements were not user friendly for either party because they

¹⁵² See IRM 57(10)8.(15)1 (Nov. 15, 1985).

¹⁵³ Although in the context of a future income collateral agreement, the Manual did provide an allowance for ordinary and necessary living expenses, there was no indication that a similar allowance would be used in the determination of present and future income.

¹⁵⁴ IRM 57(10)7.51(6) (Nov. 15, 1985).

¹⁵⁵ See *supra* note 145.

were tedious to complete, spanned a relatively long period of time, and required mandatory annual filings by the taxpayer. Moreover, only with continuous monitoring would the Service be able to verify the taxpayer's compliance over the term of the agreement. Thus, from a cost benefit analysis, the difficulties of completion and compliance often outweighed the potential benefits.

For example, if the amount offered was small in proportion to the outstanding liability, the Service would often insist on the execution of a Future Income Collateral Agreement (FICA).¹⁵⁶ In essence, a FICA was an agreement to make additional payments ranging from twenty to fifty percent of gross annual income over an agreed upon baseline amount.¹⁵⁷ "Gross" annual income was the sum of all the taxpayer's financial income with the taxpayer's adjusted gross income as defined under section 62 of the Code as the starting point. Added back to that amount were non-financial tax losses including those recognized from the sale or exchange of capital assets, bad debts, as well the reversal of the deduction for long-term capital gains then allowed under section 1202 of the Code. Additionally, all nontaxable financial income and profits from any source including the fair market value of gifts, bequests, devises, inheritances, sick pay, insurance proceeds, and nontaxable gains from a condemnation award or involuntary conversion pursuant to section 1033 of the Code were added back to that amount.¹⁵⁸ Finally, after deducting the federal income tax paid in the year in which the annual income was computed, as well as any payment required under the terms of the Offer, the end result was gross annual income.¹⁵⁹

The baseline amount was the taxpayer's estimated "ordinary and necessary" living expenses unique to each individual taxpayer and subject to negotiation between the taxpayer and the Service.¹⁶⁰ Factors to be considered by Service personnel included

¹⁵⁶ IRM 57(10)2.25(6)(a) (Nov. 15, 1985). On the other hand, in lieu of a FICA, the Service could be persuaded to accept an increase of "at least an amount equivalent to what the government could reasonably expect to recover via the [FICA]" to the amount offered. IRM 57(10)(11).412 (Nov. 15, 1985).

¹⁵⁷ IRM 57(10)(11).413(1) (Nov. 15, 1985).

¹⁵⁸ IRM 57(10)(11).416(2)(a)1-3 (Nov. 15, 1985).

¹⁵⁹ IRM 57(10)(11).416(2)(b)1-2.

¹⁶⁰ IRM 57(10)(11).413(2). These expenses were claimed by the taxpayer on one of three forms: IRS Form 433-A (revised Jan. 2008), IRS Form 433-B (revised Jan. 2008),

“the anticipated rate of inflation, expected changes in the size of the family, state and local taxes, [social security and Medicare taxes] withheld and unusual expenses, such as alimony, child support and abnormal medical and dental costs.”¹⁶¹ For each year the FICA was in effect (potentially as long as five years),¹⁶² the taxpayer was required to submit an IRS Form 3439 (Statement of Annual Income), her federal income tax return, and a payment—if required.¹⁶³ The amount paid through a FICA could never exceed the total amount of tax, penalties, and interest less any amounts paid as a lump sum or an installment payment.

Unquestionably, the two tax benefit collateral agreements, Collateral Agreement—Adjusted Basis of Specific Assets (BRCA) and Collateral Agreement—Waiver of Net Operating Losses and Capital Losses (LWCA) were the most tedious and complex. Unlike a FICA that required actual monetary payments, increases of a taxpayer’s tax liability attributable to the temporary or permanent reduction of certain tax attributes would be treated as “payments” to be applied to the compromised tax liability. Consequently, it was an administrative nightmare to keep track of the amounts paid with the Offer (including installment payments and FICA payments), plus the tax increase payments to assure that the aggregate amount did not exceed the compromised liability plus accrued interest and penalties. Moreover, if through the various sources of payment the compromised tax liability was satisfied in full, a “readjustment” of any remaining tax attributes legitimately still available to the taxpayer might be required. Thus, the complexity of computing and keeping track of all the “payments,” eliminating or correcting erroneous adjustments, and assuring compliance, presented daunting tasks for the taxpayer and the Service.

Specifically, pursuant to a BRCA, the bases of certain assets were reduced to quick sale value to be used for “the life of the asset or until the full amount of liability which was compromised, plus interest and penalty that would have been due in the absence

or IRS Form 4822 (revised Apr. 2012) (Statement of Annual Estimated Personal and Family Expenses); *see also* IRM 57(10)(11).413(3).

¹⁶¹ IRM 57(10)(11).413(2).

¹⁶² IRM 57(10)(11).413(5).

¹⁶³ IRM 57(10)(11).413(1).

of the compromise, is recouped by payments on the [O]ffer and any related collateral agreements.”¹⁶⁴ So, depending on the amount of the compromised liability and the depreciation life of the asset, the taxpayer might be compelled to use the reduced basis for many years or possibly permanently. As a further complication, if through happenstance, the compromised liability was completely recouped and the taxpayer still owned the asset, the basis of the asset would be recomputed for the remaining depreciation period.¹⁶⁵ So, to assure the taxpayer’s compliance with these complicated rules, the Service would have to monitor the taxpayer’s income tax returns to determine whether the taxpayer used the reduced basis throughout the period in which the compromised liability remained unsatisfied; and, if applicable, properly recomputed it in the event the compromised liability was recouped.

Finally, a LWCA was commonly executed by taxpayers with net operating losses or capital losses incurred before, during, or after the periods covered by the Offer.¹⁶⁶ According to its terms, the taxpayer waived the right to carryover those losses to years ending after the date of acceptance of the Offer.¹⁶⁷ Similar to a BRCA, the waiver of losses was effective until the full amount of the liability was recouped.¹⁶⁸ In the event the compromised liability was completely recouped, the amount of any remaining loss carryover available for future use would be recomputed.¹⁶⁹ To assure taxpayer compliance with these complicated rules, the Service would have to monitor the taxpayer’s applicable income tax returns and amended income tax returns to determine whether the taxpayer honored the waiver. In the event the compromised tax was recouped, the Service would then have to monitor subsequently filed returns to ascertain whether the

¹⁶⁴ IRM 57(10)(11).422 (Nov. 15, 1985).

¹⁶⁵ *Id.* The recomputed basis would be the “pre-compromise” basis less the amount of allowable depreciation that would have been taken in the absence of the compromise.

¹⁶⁶ IRM 57(10)(11).43(1) (Nov. 15, 1985).

¹⁶⁷ *Id.*

¹⁶⁸ IRM 57(10)(11).43(3).

¹⁶⁹ *Id.* The recomputed loss carryover would be the amount of the original loss reduced by the amount of the loss that would have been taken in the absence of the compromise.

amount of any remaining available loss carryover was properly recomputed and applied.

So considering the complex computations and multiple annual filings required from the taxpayer, as well as Service manpower necessary to administer and monitor taxpayer compliance with a high likelihood of taxpayer default, it was not surprising that an Offer that included collateral agreements was not enthusiastically embraced by either party as a viable collection option.

IV. THE SERVICE'S 1992 MAJOR OVERHAUL OF THE OFFER PROGRAM

A. Low Offer Submissions and Acceptances Attributable to Lack of Service Personnel Commitment to Offers and Uncertainty in Determining the Adequacy of an Offer

Prior to 1992, there was a dearth of Offers made by taxpayers.¹⁷⁰ In no particular order, there were various explanations for this phenomenon. One explanation was high-level Service personnel did not favor or encourage Offers, and consistent with that policy, revenue officers assigned to a taxpayer's account were not permitted to solicit Offers as a means of resolving collection issues.¹⁷¹ Additionally, the level of commitment to the Offer process as a viable collection tool varied from district to district due to "the attitude of district supervisory officials concerning optimum collection technique, the discretion left to district personnel by the broad guidelines set by the National Office, and the importance of various statistical data reflecting case closings."¹⁷² Finally, as discussed in Sections III.D.2 and D.3 *supra*, the lack of a quantitative formula to

¹⁷⁰ See T.D. 8829, 64 Fed.Reg. 39020, 39022 (July 21, 1999) ("From the 1930's to the early 1990's, offers in compromise were not widely used to resolve tax cases."); *see also*, MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 15.03[4][a] n.34 (2d ed. 1991) (citing IRS ANNUAL REPORT 54 tbl.13 (1988)) (reporting that of the 2.6 million taxpayer delinquent accounts closed in 1987 and 1988, only 7000 Offers were made).

¹⁷¹ See IRM 57(10)1.5(2)(b) (Nov. 15, 1985); Robert H. Breakfield & Charles E. Alvis, *Author's Update: Revised IRS Procedures For Offers in Compromise Under Section 7122*, 72 TAXES 277, 277 n.3 (1994) (citing the EXECUTIVE SUMMARY OF THE COMMISSIONER'S ADVISORY GROUP MEETING (1991)).

¹⁷² SALTZMAN, *supra* note 170, ¶ 15.03[4][a].

compute the Maximum Collection Amount, coupled with the Service's insistence of the inclusion of tedious collateral agreements, likely resulted in a small number of Offer submissions and an even smaller number of acceptances.

B. Due to Lackluster Collections of Delinquent Tax Liabilities the Service Revised Its Offer Objectives and Procedures

By all accounts, the objective of the Offer program "to effect maximum collection with the least possible loss or cost the Government"¹⁷³ had been a dismal failure. By the end of fiscal year 1991, there was approximately \$111 billion of outstanding nationwide delinquent tax liability.¹⁷⁴ Moreover, a review conducted by the General Accounting Office (GAO) revealed that for all rejected Offers, the Service collected only 5 percent of the amount offered at a later date. For example, if the Service rejected a taxpayer Offer of \$10,000, and then pursued normal collection action, it was likely to collect only \$500.¹⁷⁵ Consequently, the Service's Offer rejection policy was not cost effective as the follow up collection efforts yielded far less tax dollars than the taxpayers had previously offered.

On February 26, 1992, the Service issued Policy Statement P-5-100 in which it revised its collection priorities by implementing the following new Offer objectives:

- To resolve accounts receivable which cannot be collected in full . . . ;¹⁷⁶
- To effect collection of what could reasonably be collected at the earliest time possible and at the

¹⁷³ IRM 57(10)1.4(1) (Nov. 15, 1985).

¹⁷⁴ Collection Division Manager, Internal Revenue Service, Remarks at the Meeting of the District of S.C. Association of CPAs in Columbia, S.C. (Nov. 19, 1992); see Breakfield & Alvis, *supra* note 171, at 278; see also Terri Gutierrez, *Easier Offers in Compromise: Revised Guidelines on Acceptable Living Expenses Make OICs More Attractive*, J. ACCT. (Dec. 1997), available at <http://www.journalofaccountancy.com/Issues/1997/Dec/gutier>.

¹⁷⁵ Breakfield & Alvis, *supra* note 171, at 278.

¹⁷⁶ IRM 57(10)1.2(1) (Feb. 26, 1992).

least cost to the government (Reasonable Collection Potential);¹⁷⁷

- To give taxpayers a fresh start to enable them to voluntarily comply with the tax laws (Taxpayer Compliance);¹⁷⁸ and
- To collect funds which may not be collectible through any other means.¹⁷⁹

Although the Service's new objectives collectively reflected a liberalization of its Offer policy, it did not extend to accepting Offers on basis of equity or hardship.¹⁸⁰ The most significant change was the Service's decision to lower collection expectations by replacing the Maximum Collection Amount with the Reasonable Collection Potential as the baseline for an acceptable Offer, based on the belief that collecting a potentially lesser amount over a much shorter period of time was a more attainable and realistic goal. Additionally, the Service believed that more user friendly Offer policies and procedures would encourage many delinquent taxpayers to settle their outstanding tax liability and re-enter the tax system as compliant taxpayers going forward.

1. The Service Created a Mathematic Formula to Compute the Reasonable Collection Potential

As discussed in Section III.C.2 and C.3 *supra*, the inexactness in the computation of the Maximum Collection Amount often mandated the Service's insistence of the inclusion of one or more collateral agreements to make an Offer viable. So in an effort to provide certainty and eliminate the necessity of those cumbersome agreements, the Service created a mathematic formula to compute the Reasonable Collection Potential (Reasonable Collection Potential Formula). Also, consistent with its desire to expedite collection, the Service's new policy included the acceptance of only

¹⁷⁷ IRM 57(10)1.2(2).

¹⁷⁸ IRM 57(10)1.2(3).

¹⁷⁹ IRM 57(10)1.2(4).

¹⁸⁰ See IRM 57(10)(10).1(2) (Feb. 26, 1992), in which the Manual made it clear that Offers based on equity and hardship would not be consistent with Attorney General opinions barring such compromises.

cash Offers payable within ninety days of approval, or deferred payment Offers payable in no more than two years from approval unless the taxpayer could demonstrate extraordinary circumstances justifying a longer period.

a. The Reasonable Collection Standard Formula

i. Net Equity Component

Similar to the computation of the Maximum Collection Amount, the starting point of the Reasonable Collection Potential Formula was the taxpayer's net equity in her assets.¹⁸¹ Although the formula retained the Manual's previous definition of net equity as the difference between the quick sale values of the taxpayer's assets,¹⁸² less any encumbrances, with priority over the government's tax lien, the Service expressed a willingness to accept the lower forced sale value or the even lower minimum bid value, if warranted under the circumstances.¹⁸³ Additionally, the Service encouraged its personnel to be open in negotiations with taxpayers "to avoid inflexible, non-negotiable values."¹⁸⁴

ii. Present and Future Income Component

The new formula incorporated workable criteria to quantify the present and future income component to be included in the Offer amount. For this purpose, the concept of "income" was recast as "disposable income," i.e., the taxpayer's financial income less an allowance for reasonable "lifestyle expenses"¹⁸⁵ and "allowable expenses."¹⁸⁶ In the computation of disposable income, an allowance for lifestyle expenses (such as a manner of dress or type of automobile) would be granted if it was consistent with the

¹⁸¹ *Id.*

¹⁸² *Id.* (The taxpayer's "assets" included those beyond the reach of government collection such as property located outside of the U.S. or property own by tenancy or the entirety.).

¹⁸³ See IRM 57(10)(10).1(2) (Sept. 22, 1994). The "minimum bid value" is an amount equal to twenty percent of the forced sale value not to exceed the total amount of tax, penalty, interest, lien fees, expenses of levy and sale and other charges. IRM 5.10.4.8(6) (July 3, 2009).

¹⁸⁴ See IRM 57(10)(10).1(2).

¹⁸⁵ IRM 57(10)(13).10(1)(b) (Sept. 22, 1994).

¹⁸⁶ IRM 57(10)(13).10(1)(b)(4).

expectations of the taxpayer's profession.¹⁸⁷ As an illustration, a real estate agent listing and selling upscale homes would be expected to drive a moderately expensive, late model, full size car in transporting her wealthy cliental from property to property. So, in that case, a relatively high car loan payment would be deemed to be a reasonable expense.¹⁸⁸ Conversely, because a physician's ownership of a vacation home would have no connection with her practice of medicine, and, thus, there would be no allowance for the mortgage payment because it would be considered a lifestyle choice that was "both excessive and unnecessary for maintaining her professional image."¹⁸⁹

In contrast to lifestyle expenses, "allowable expenses" were more fundamental to the taxpayer's ability to meet her basic living necessities. Although the Manual did not elaborate on the scope of the allowance, it did cross reference to the section of the Manual¹⁹⁰ dealing with installment agreements.¹⁹¹ Unlike an Offer, in an installment payment agreement, the taxpayer must pay the entire amount of the outstanding tax liability over an agreed upon period.¹⁹² In negotiating payment amounts with the taxpayer, IRM 5323 directed revenue officers not to make demands that would jeopardize the taxpayer's ability to support her family, pay current taxes, or earn income from which to make the installment payments. So, by cross-referencing IRM 5323, the Service's new policy allowed an offering taxpayer to retain sufficient funds to pay for her basic necessities.¹⁹³

Thus, a taxpayer's monthly disposable income was the difference between monthly financial income and reasonable monthly lifestyle and allowable expenses computed over a sixty-month period. Additionally, as an incentive to encourage

¹⁸⁷ IRM 57(10)(13).10(1)(b).

¹⁸⁸ IRM 57(10)(13).10(1)(b)(1).

¹⁸⁹ IRM 57(10)(13).10(1)(b)(3).

¹⁹⁰ IRM 5323 (Aug. 29, 1985).

¹⁹¹ IRM 57(10)(13).10(1)(b)(4) (referring to IRM 5323); IRM 57(10)(10).1(4) (Feb. 26, 1992).

¹⁹² See I.R.C. § 6159 (2006).

¹⁹³ See Prop. Treas. Reg. § 301.7122, 64 Fed. Reg. 39022, 39022 (July 21, 1999) (The Service acknowledged the relevance of "allowable expenses" in post-1992 Offers stating, "In administering its collection operations, including both the installment agreement program and the compromise program, the IRS has always permitted taxpayers to retain sufficient funds to pay reasonable living expenses.").

taxpayers to pay the Offer amount relatively quickly, the Service would apply a present value discount to the taxpayer's monthly disposable income if it was paid within ninety days of acceptance. For example, assuming a current interest rate of seven percent, the present value of \$300 per month over a sixty-month period, or \$18,000, would be \$15,228.¹⁹⁴ On the other hand, if the Offer amount was payable over a term greater than ninety days of acceptance, there would be no present value discount. So, in the latter case, the Service would not consider an Offer that did not include the entire \$18,000.¹⁹⁵ Consequently, in this example, by paying the Offer amount within ninety days of acceptance, the taxpayer would have saved \$2772 on what would have otherwise been the minimal amount the Service would have been willing to accept.

2. Another Service Objective—Taxpayer Compliance

Taxpayer Compliance was another main objective in the Service's revision of its Offer policy. The goal was to encourage a taxpayer to resolve her delinquent tax liability with the expectation that she would re-enter the voluntary tax system as a complaint taxpayer who would be current on her ongoing tax filing and payment obligations. To accomplish this goal, the Service took the following steps.

First, pursuant to a new Manual section titled *Advising Taxpayers of Offer Provisions*,¹⁹⁶ a Service employee (such as a revenue officer) was directed to discuss the possibility of an Offer with a delinquent taxpayer who was financially unable to pay her tax liability in full.¹⁹⁷ In that discussion, the Service employee was to advise the taxpayer of the Offer policy and procedures, the forms to be completed (with the Service employee's assistance, if

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* The Service's new Offer policy clearly favored cash Offers. As to deferred payment Offers, the general rule limited the payout period to no more than two years from the date of acceptance. IRM 57(10)6.4(3) (Sept. 22, 1994). Although the Manual indicated a longer payout period might be acceptable under extraordinary circumstances, such circumstances were not defined. See IRM 57(10)6.4(3)(a).

¹⁹⁶ IRM 57(10)5 (Feb. 26, 1992).

¹⁹⁷ IRM 57(10)5.1(1) (Sept. 22, 1994).

necessary), as well as the benefits the taxpayer would receive from an accepted Offer.¹⁹⁸

Second, the Service introduced a new five-year mandatory compliance period as an additional Offer prerequisite.¹⁹⁹ Prior to the 1992 Offer changes, an Offer was not contingent on the taxpayer's future compliance with her ongoing tax obligations. Therefore, as long as the taxpayer complied with the terms of the Offer, her failure to be current with those obligations would not jeopardize the status of the compromise. So under this new Offer provision, a taxpayer was subject to a five-year mandatory compliance period from the date the Service accepted the Offer.²⁰⁰ Consequently, a taxpayer who fell out of compliance during the mandatory period would be in default of the Offer, providing the Service with the option to retroactively reinstate the amount of the compromised liability (less a credit for amounts paid by the taxpayer).²⁰¹

C. Modifications to the 1992 Offer Policy

1. A 1993 GAO Study Noted Lack of Uniformity in Offer Policy

According to a December 1993 GAO report critiquing the Service's 1992 Offer policy,²⁰² there was a wide disparity of Offer acceptance percentages among the nation's sixty-three district offices.²⁰³ One explanation for this disparity was the lack of uniform guidelines that established the amount of allowable

¹⁹⁸ IRM 57(10)5.1(2). An additional sampling of disclosures made by the Service employee to the taxpayer included advising her of the suspension of collection during the processing of the Offer, the duty of the taxpayer to initiate the first specific Offer proposal, and the making of a voluntary good faith deposit with the submission of the Offer. IRM 57(10)5.1(3)-(5).

¹⁹⁹ IRM 57(10)5.1(9).

²⁰⁰ See IRS Form 656, at 8(d) (revised Sept. 1993).

²⁰¹ *Id.* (Significantly, the five year mandatory compliance period was not limited to deferred payment Offers. Even a taxpayer who made a lump sum Offer was required to remain current throughout the period. If she failed to do so, the Service could declare the Offer to be in default and require payment of the difference between the compromised liability and the lump sum payment.).

²⁰² U.S. GEN. ACCT. OFFICE, GAO/GGD-94-47, TAX ADMINISTRATION: CHANGES NEEDED TO COPE WITH GROWTH IN OFFER IN COMPROMISE PROGRAM 1 (1993).

²⁰³ *Id.* at 15. In the first ten months of the 1993 fiscal year, the lowest and highest Offer acceptance rates were seventeen percent and seventy-nine percent, respectively. *Id.*

monthly expenses. Because monthly net disposable income was the difference between the taxpayer's income and the amount of allowable monthly expenses, higher allowable monthly expenses would result in lower monthly disposable income. Although allowable expenses were defined as those necessary to carry on the taxpayer's business and provide minimal support for her family, the determination of the amount and type of expense actually allowed in any given case was left to the discretion of the revenue officer. Consequently, an Offer acceptable in a district with a liberal policy regarding allowable monthly expenses might be rejected in a district with a more restrictive policy.

2. The Service's New Standards for Allowable Monthly Expenses Were Criticized

On August 29, 1995, in an effort to establish nationwide uniformity with regard to allowable expenses, the Service revised IRM 5323 to create two types of allowable expense—necessary expenses and conditional expenses.²⁰⁴ With respect to the Reasonable Collection Potential Formula, only necessary expenses, however, were considered in the computation of disposable income.²⁰⁵

Necessary expenses were defined as any reasonable expense required to provide for the taxpayer's family's health and welfare or for the production of income.²⁰⁶ In an effort to establish "uniformity," certain expenses were subjected to a national standard while others were subjected to a local standard. For example, the allowance for food, housekeeping supplies, apparel, and services, as well as personal care products and services, was subject to a national standard promulgated by the Bureau of Labor Statistics.²⁰⁷ Conversely, the allowance for housing (including utilities) and transportation expenses was subject to a local standard.²⁰⁸ Finally, the allowance for any other necessary

²⁰⁴ IRM 5323.12(1) (Aug. 29, 1995).

²⁰⁵ See IRM 5.8.4.2.2 (May 26, 1999).

²⁰⁶ IRM 5323.12(1)(a).

²⁰⁷ IRM 5323.12(1)(a)(1).

²⁰⁸ IRM 5323.12(1)(a)(2).

expenses was to be determined by the Service employee responsible for the case.²⁰⁹

Yet, in spite of these efforts, tax practitioners criticized the Service's adherence to the national standards as being unrealistic. For example, the national standard for food costs (effectively an "average" of nationwide food costs) failed to account for the significant variances in such costs across the country. In fact, in some locales, the national standard discriminated against taxpayers living in the inner city who had higher food costs as compared to taxpayers living in the suburbs.²¹⁰ Thus, in many instances, the uniformity the Service sought to achieve led to unintended inequities.

3. The Service Unceremoniously Modified the Reasonable Collection Potential Formula by Substituting Current Market Value for Quick Sale Value and Eliminating the Present Value Discount in Computation of Monthly Disposable Income

As discussed in Section IV.B.1.b. *supra*, pursuant to the Reasonable Collection Potential Formula, the amount of an adequate Offer paid within ninety days of acceptance by the Service was the sum of the taxpayer's net equity plus the present value of sixty months of disposable income. Yet, in 1997, without any forewarning or explanation in the Manual or elsewhere,²¹¹ on a revised IRS Form 656, the Service made significant modifications to the formula that were detrimental to the taxpayer. First, assets were to be valued at "current market value," rather than the much lower quick sale value.²¹² Second, the present value discount was totally eliminated.²¹³ By virtue of these changes, the amount of a viable Offer as computed on the revised Form 656 was significantly higher than it would have been

²⁰⁹ IRM 5323.12(1)(a)(3).

²¹⁰ See George E. Marifian, *Offers-in-Compromise: Did the IRS Get the Message?*, 1 J. TAX PRAC. & PROC. 25, 26 (1999).

²¹¹ See Lawrence D. Garr, *Cutting a Deal With the IRS in 1997: Forms Over Substance*, TAX NOTES, July 28, 1997, at 547, 548-49 ("While the offer program may be alive and well in the Manual, and the IRS has issued no policy statements to the contrary, the program is being killed by IRS forms, instructions, and worksheets.").

²¹² IRS Form 656, at 4-5 (revised Mar. 2011).

²¹³ *Id.* at 5.

according to the criteria set forth in the Manual.²¹⁴ Obviously, these austere modifications made it more difficult for taxpayers to submit viable Offers; and, thus, decreased the number of accepted Offers.²¹⁵

In response to criticism that the formula modifications were unfair to taxpayers, Harry T. Manaka, the IRS National Director for Collection Services, justified the changes as being necessary to "curtail the number of non-processable offers that waste everybody's time."²¹⁶ Perhaps a more cynical explanation was the Service's desire to revert back to its old policy of maximizing collections.

4. The Taxpayer Bill of Rights 2 Eliminated Some Red Tape in the Offer Process

On a positive note, section 503(a) of the Taxpayer Bill of Rights 2 (amending section 7122(b) of the Code) streamlined the Offer acceptance process by eliminating the requirement of a written legal opinion from the chief counsel with regard to Offers of compromised tax liability of less than \$50,000.²¹⁷ Prior to the amendment, the chief counsel was required to submit a written legal opinion for all Offers of compromised tax liability in excess of \$500. As a result, virtually every Offer required a legal opinion creating a layer of red tape that further delayed formal acceptance. As a consequence of the amendment, the acceptance of Offers of compromised tax liability of less than \$50,000 was delegated to middle managers of the collection division; and, thus, significantly reduced the response time.²¹⁸

V. CONGRESS'S LIFTING OF THE ATTORNEY GENERAL'S BAN ON CONSIDERING FINANCIAL HARDSHIP, EQUITY AND PUBLIC

²¹⁴ See Lawrence D. Garr, *The IRS—Still Going for the Jugular*, WASH. TIMES, Jan. 12, 1998, at A15 (noting that IRS Form 656 was modified without any corresponding change to the Manual). Apparently, the changes on the revised IRS Form 656 escaped the notice of commentators who continued to rely on the values set forth in the Manual. See, e.g., Robert H. Breakfield & Charles E. Alvis, *Author's Update: IRS Procedures for Offers-In-Compromise Under Section 7122*, 75 TAXES 337, 339-41 (1997).

²¹⁵ Garr, *supra* note 211, at 548.

²¹⁶ Garr, *supra* note 214 (internal quotation marks omitted).

²¹⁷ Pub. L. No. 104-168, 110 Stat. 1461 (1996).

²¹⁸ Breakfield & Alvis, *supra* note 214, at 338.

POLICY AS THE BASIS FOR AN OFFER FAILED TO LIVE UP TO ITS PROMISE

Prior to the enactment of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 1998),²¹⁹ in spite of the liberalization of its Offer objectives discussed *supra*, the Service continued to adhere to the Attorney General's longstanding ban on financial hardship, equity, and public policy as being the basis for an Offer (Attorney General's Ban).²²⁰ Finally, more than six decades after the Attorney General insisted that any reversal of the ban be made by Congress,²²¹ Congress finally acted. In the legislative history of RRA 1998, Congress proclaimed that it "anticipate[d] that the [Service] will take into account factors such as equity, hardship, and public policy where a compromise of . . . income tax liability would promote effective tax administration."²²² Moreover, viewing compromise as a constructive way to settle outstanding tax liability and enhance taxpayer compliance, Congress encouraged the Service to make it easier for taxpayers to make Offers and to "do more to educate the taxpaying public about [their] availability . . ."²²³

Although the positive tone of the legislative history suggested that a wide sweeping reform of the Offer process was in the offing, the actual statutory amendments to section 7122 of the Code fell well short of that goal. In fact, the most significant statutory provisions simply directed the Service to do what it had already done, i.e., establish adequate allowances for basic living expenses. Beyond that specific statutory directive, any further pro-taxpayer equitable reform of the Offer process was left to the discretion of the Service. Subsequently, as promulgated in temporary and final

²¹⁹ Pub. L. No. 105-206, 112 Stat. 685.

²²⁰ See IRM 57(10)(10).1 (Feb. 26, 1992) (clarifying that Offers based on equity and hardship would not be consistent with Attorney General opinions barring such compromises).

²²¹ See *supra* Section I.B.3.a for a detailed discussion of the Attorney General's Ban.

²²² H.R. REP. NO. 105-599, at 289 (1998). Congress's directive was reminiscent of the Penalty Hardship Standard that allowed the Service to consider an Offer by a solvent taxpayer to compromise a penalty in the interest of "justice, equity, and public policy." For a discussion of the Penalty Hardship Standard approved by the Attorney General in 1919, and its subsequent renouncement by the Attorney General in 1934, see *supra* Section I.B.2. and Section I.B.3.a., respectively.

²²³ H.R. REP. NO. 105-599, at 289.

regulations, the Service appeared to embrace the spirit of the legislative history by introducing new hardship and public policy based Offers. Unfortunately, the Service established such stringent standards for taxpayer eligibility that were nearly impossible to meet. So, as a practical matter, the Service failed to extend the contours of its authority to incorporate hardship, equity, and public policy factors in a very meaningful way.

A. New Section 7122(c) Directing the Service to Establish Adequate Allowances for the Basic Living Expenses of Taxpayers Submitting Offers was Underwhelming

As described *infra*, newly enacted section 7122(c)²²⁴ directed the Service to establish what it had already established, i.e., adequate allowances for basic living expenses to be granted to taxpayers submitting Offers. First, section 7122(c)(1) provided that the Service “*shall*” prescribe guidelines to determine whether an Offer is adequate and should be accepted. Next, section 7122(c)(2)(A) stated that in prescribing the above referenced guidelines, the Service “*shall* develop and publish schedules of national and local allowances” to assure that taxpayers who submit Offers would be allowed to retain adequate resources to provide for basic living expenses. Finally, pursuant to section 7122(c)(2)(B), “the guidelines *shall* provide that officers . . . of the [Service] *shall* determine, on the basis of the facts and circumstances of each taxpayer, whether the use of the schedules . . . is appropriate and *shall* not use the schedules to extent such use would result in the taxpayer not having adequate means . . . for basic living expenses” (emphasis added).

Simply stated, the sum and substance of sections 7122(c)(1) and (c)(2) was to require the Service to factor a taxpayer’s financial ability to pay basic living expenses into the computation of an acceptable Offer amount. The only significant enhancement achieved by this directive was the additional proviso that would require the Service to disregard the national or local standards if as applied to a given taxpayer would not leave her with adequate

²²⁴ Pursuant to the enactment of the Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, 120 Stat. 345 (2006), section 7122(c) of the Code was renumbered as section 7122(d). All references herein to section 7122(c) or its subsections are to current section 7122(d).

means to cover those expenses. In that case, the Service was directed to disregard the standards and grant allowances based on the peculiar facts and circumstances of the taxpayer. Although the codification of that directive should not be minimized, section 7122(c) fell far short of a much broader congressional promise to inject financial hardship and public policy considerations into the Offer process.²²⁵

B. Actions Speak Louder Than Words—Two New Types of Effective Tax Administration Offers were of Questionable Utility to the Taxpayer

1. The Temporary Regulations

In spite of statutory language that did not match the fervor of the legislative history, the Service appeared to embrace the spirit of the latter by taking into account equity, hardship, and public policy factors in formulating new Offer policy. The temporary regulations established two new Offer types that purportedly incorporated those factors. One Offer type was based on economic hardship that would result from the collection of the full liability (Hardship Offer),²²⁶ and the other Offer type was based on exceptional circumstances such that, regardless of the taxpayer's financial situation, the collection of the full liability would be detrimental to voluntary compliance by taxpayers (Public Policy Offer)—collectively referred to as the "ETA Offers."²²⁷ Importantly, a taxpayer was eligible to submit an ETA Offer only if she was ineligible to submit any other type of Offer. So, if liability was at issue, or the taxpayer lacked the resources to pay

²²⁵ I.R.C. § 7122(c)(3)(A) (2006). The final equity hardship based provision barred the Service from rejecting an Offer submitted by a low-income taxpayer solely on the basis of the amount offered. *Id.* This provision, however, has little practical significance. Considering the limited financial resources that would be available to such an impoverished taxpayer, it is unlikely she would ever be capable of satisfying her liability. So even without the statutory ban, acceptance of a minimal Offer in lieu of an extended installment agreement or placing the taxpayer in uncollectable status would in most cases be in the best interest of the Service.

²²⁶ Temp. Treas. Reg. § 301.7122-1T(b)(4)(i) (2000).

²²⁷ Temp. Treas. Reg. § 301.7122-1T(b)(4)(ii) (2000).

the tax liability in full, she would be ineligible to submit an ETA Offer.²²⁸

So, in order to submit a Hardship Offer, a taxpayer would have to demonstrate that, in spite of possessing the resources to pay the liability in full, if compelled to do so, she would be financially incapable of meeting her basic living expenses.²²⁹ The temporary regulations set forth three types of economic hardship, including one in which the taxpayer's medical condition rendered her incapable of earning a living so that her "financial resources will be exhausted providing for care and support during the course of the condition; . . ."²³⁰ Additionally, reminiscent of the inexactness of the computation of the Maximum Collection Amount, the temporary regulations provided four factual examples of financial hardship²³¹ that purportedly would have qualified for a Hardship Offer with no guidance in how to determine an adequate amount to offer. In fact, the preamble stated that the amount of an acceptable Offer, and any other mandatory terms, were to be left to the discretion of the Service, and, thus, obviously subject to change. So, in the absence of any specific guidance, a taxpayer would be compelled to formulate a Hardship Offer amount based on her special financial needs with no assurance that the Service would accept it.

Conversely, financial hardship was of no relevance in qualifying for a Public Policy Offer. As stated *supra*, a Public Policy Offer would be appropriate in cases where "exceptional circumstances exist such that collection of the full liability will be detrimental to voluntary compliance by taxpayers; . . ."²³² Beyond that statement, the only guidance provided in the temporary

²²⁸ Temp. Treas. Reg. § 301.7122-1T(b)(4) (2000) (In that case, the taxpayer would be eligible to submit an Offer based on doubt as to liability or doubt as to collectability).

²²⁹ Temp. Treas. Reg. § 301.7122-1T(b)(3)(ii) (2000).

²³⁰ Temp. Treas. Reg. § 301.7122-1T(b)(4)(iv)(B)(1) (2000). A second hardship example involved the need to retain sufficient monthly income to provide care for dependents who have no other means of support. § 301.7122-1T(b)(4)(iv)(D) ex. 1. A third hardship example involved a taxpayer who could not borrow against the equity in his assets; and, if compelled to liquidate those assets, he would be unable to meet his basic living expenses. § 301.7122-1T(b)(4)(iv)(D) ex. 3.

²³¹ Temp. Treas. Reg. § 301.7122-1T(b)(4)(iv)(D) (2000) (providing three examples of individual taxpayers with financial hardships and one example of a non-individual taxpayer with a financial hardship).

²³² Temp. Treas. Reg. § 301.7122-1T(b)(4)(ii) (2000).

regulations was gleaned from two examples suggesting that a tax liability that was outstanding due to excusable circumstances beyond the control of the taxpayer could potentially be the basis for a Public Policy Offer. Because these examples were retained without change in the final regulations, they are discussed in detail in Section V.B.2 *infra*.

Finally, even assuming hardship or public policy/equitable considerations warranted an ETA Offer, the Service could nonetheless reject it if the Offer would undermine taxpayer compliance with tax laws.²³³ More specifically, the temporary regulations stated that the Service would be inclined to reject an ETA Offer made by a taxpayer who had a history of noncompliance with her tax obligations, had taken deliberate actions to avoid paying taxes, or had encouraged others to refuse to comply with tax laws.²³⁴

2. The Final Regulations Narrowed the Scope and Viability of ETA Offers

Since the terms of accepted Offers are subject to public disclosure, the Service would naturally be concerned with taxpayers' perceptions of the Service's acceptance policy.²³⁵ So, if taxpayers were to view it as being overly liberal, they might be tempted not to pay their tax liabilities with the possibility of a favorable compromise in the offing. Perhaps this was the reason the Service narrowed the scope and viability of ETA Offers in the final regulations.²³⁶

a. Non-Individual Business Taxpayers Not Eligible for Hardship Offer

One of the examples in the temporary regulations indicated that a non-individual business taxpayer was eligible to submit a

²³³ Temp. Treas. Reg. § 301.7122-1T(b)(4)(iv)(C) (2000).

²³⁴ Temp. Treas. Reg. § 301.7122-1T(b)(4)(iv)(C)(1) to (3) (2000).

²³⁵ See I.R.C. § 6103(k)(1) (2006) ("Return information shall be disclosed to members of the general public to the extent necessary to permit inspection of any accepted offer-in-compromise under section 7122 relating to the liability for a tax imposed by this title.").

²³⁶ T.D. 9007, 67 Fed. Reg. 48,025 (July 23, 2002).

Hardship Offer.²³⁷ In the final regulations, the Service reversed course because of concern that accepting such a Hardship Offer would raise the issue of whether the government should forego collection to support a failing business.²³⁸ In other words, the Service feared that financially challenged businesses would be tempted to prioritize the payment of other expenses over tax obligations with the expectation of a favorable compromise of the latter.²³⁹ For that reason, the Service concluded that compromising a tax liability of a non-individual business taxpayer based on economic hardship would not necessarily promote effective tax administration.²⁴⁰

b. Final Regulations Effectively Eviscerate the Vitality of Public Policy Offers

i. New Requirements for Public Policy Offers

In the preamble, the Service asserted that its acceptance of Public Policy Offers was expected to be rare,²⁴¹ and in deciding whether to accept a Public Policy Offer, "the [Service] will presume that the correct application of the tax laws produces a fair and equitable result, absent exceptional circumstances."²⁴² More specifically, the Service expressed concern that Public Policy Offers might be inequitable to similarly situated taxpayers who paid their tax liability in full. As discussed in Section V.B. *supra*, the temporary regulations had tersely stated that Public Policy Offers would be considered under "exceptional circumstances . . . such that collection of the full liability will be detrimental to voluntary compliance by taxpayers . . ."²⁴³ and the "[c]ompromise of the [full] liability will not undermine compliance by taxpayers

²³⁷ Temp. Treas. Reg. § 301.7122-1T(b)(4)(iv)(D) ex. 4 (2000).

²³⁸ T.D. 9007, 67 Fed. Reg. at 48,026.

²³⁹ The preamble left open the possibility, however, of a non-individual taxpayer submitting a potentially viable Public Policy Offer.

²⁴⁰ *But see* Mayer Inv. Co. v. Comm'r, 99 T.C.M. (CCH) 1216 (2010) (involving a Hardship Offer submitted by a non-individual business that the Service had considered on merits).

²⁴¹ T.D. 9007, 67 Fed. Reg. at 48,027.

²⁴² *Id.*

²⁴³ Temp. Treas. Reg. § 301.7122-1T(b)(4)(ii) (2000).

with the tax laws.”²⁴⁴ The only other insight provided in the temporary regulations was the two examples in which the Service apparently deemed the taxpayer’s lack of culpability for the delinquent tax as potential grounds for a Public Policy Offer.²⁴⁵

So, to eliminate any potential inequity to compliant taxpayers, the final regulations added the new requirement that a taxpayer submitting a Public Policy Offer must specifically identify the compelling public policy or equity considerations peculiar to her situation, as well as to demonstrate the circumstances “that justify compromise even though a similarly situated taxpayer may have paid his liability in full.”²⁴⁶ Inexplicably, in spite of adding this new requirement, the final regulations retained the above referenced examples that did not address whether the potential compromise would have been fair to similarly situated full paying taxpayers. In fact, as discussed *infra*, rather than providing any meaningful guidance, the two examples demonstrate the questionable utility of a Public Policy Offer.

In the first example, a taxpayer contracted an illness in October 1986 that required several years of nearly continuous hospitalization.²⁴⁷ During those years, the taxpayer was unable to manage his financial affairs, and thus, did not file his 1986 income tax return.²⁴⁸ Upon his recovery, the taxpayer discovered that the Service had filed a substitute for a return for the 1986 tax year.²⁴⁹ The taxpayer’s failure to file a return and pay the tax resulted in a liability that including interest and penalties three times the original tax.²⁵⁰

Although the taxpayer’s debilitating illness certainly would excuse his failure to file and pay the 1986 income tax liability, it is difficult to identify any “equitable” or “public policy” reason to compromise any amount of tax he was clearly obligated to pay. Additionally, throughout the period the tax remained unpaid, the taxpayer enjoyed the economic benefit of the “use” of the tax

²⁴⁴ Temp. Treas. Reg. § 301.7122-1T(b)(4)(iii) (2000).

²⁴⁵ Temp. Treas. Reg. § 301.7122-1T(b)(4)(iv)(E) exs. 1 & 2 (2000).

²⁴⁶ Treas. Reg. § 301.7122-1(b)(3)(ii) (as amended in 2003).

²⁴⁷ Treas. Reg. § 301.7122-1(e)(3)(iv) ex. 1 (as amended in 2003).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

money. Therefore, any Public Policy Offer submitted by the taxpayer should minimally account for the tax liability plus a reasonable amount of interest. This would leave only the penalties triggered by the taxpayer's excusable late filing and payment as the only purely "equitable" basis for a compromise. Under those circumstances, however, sections 6651(a)(1) and (a)(2) of the Code provide for the abatement of penalties with a showing of reasonable cause,²⁵¹ such as the taxpayer's illness.²⁵² Thus, in view of the availability of an alternative adequate remedy, in this instance, the submission of a Public Policy Offer would be totally unnecessary. So, eliminating the penalties from an Offer consideration, a viable Public Policy Offer would likely have to be an amount approximating the outstanding tax and some measure of reasonable interest.²⁵³ In other words, based on the facts of this example, the actual amount to potentially compromise with the submission of a Public Policy Offer would be minimal.

Additionally, even assuming a Public Policy Offer compromising all or part of the tax liability and interest was appropriate, it would be difficult to justify its fairness to a similarly situated taxpayer who had the foresight to appoint a power of attorney to pay her tax liability for any tax year in which she was incompetent. In other words, although a taxpayer would not likely contract a serious illness to avoid paying taxes, a compromise would be detrimental to voluntary compliance because a taxpayer who did take measures to satisfy his tax liability in the event of his incompetency would pay more tax than a taxpayer who did not make the appropriate arrangements.

In the second example, a taxpayer contemplating the moving of his IRA savings from one financial institution to another sent an e-mail to the Service requesting advice of how to do so without jeopardizing the tax benefits of the IRA or incurring any penalties.²⁵⁴ In an e-mail response, the Service erroneously advised the taxpayer that the funds withdrawn from his IRA

²⁵¹ I.R.C. § 6651(a)(1), (a)(2) (2006); *see also* Treas. Reg. § 301.6651-1(c)(1) (2003).

²⁵² *See* IRM 20.2.7.1 (Mar. 9, 2010).

²⁵³ *But see* IRM 5.8.11.2.2(3) (Nov. 1, 2000) (In commenting on that example, the Manual stated that the Service would expect an Offer of an amount at least equal to the amount of tax exclusive of interest and penalty.).

²⁵⁴ Treas. Reg. § 301.7122-1(c)(3)(iv) ex. 2 (as amended in 2003).

account had to be re-deposited into a new IRA account within ninety days of the withdrawal. Relying on the Service's advice, the taxpayer re-deposited the funds sixty-three days after the withdrawal.²⁵⁵ Subsequently, the Service audited the taxpayer and assessed tax, penalties, and additions to tax for failing to redeposit his IRA savings within the mandatory sixty-day period.²⁵⁶ But for the Service's erroneous advice (a copy of the e-mail was retained by the taxpayer), the taxpayer would have made a timely redeposit of the IRA funds, and thus, not incurred any tax or penalties.

Unlike the first example, none of the liability would have been assessed against the taxpayer but for his reliance on the Service's inexcusable erroneous advice. On the surface, this would appear to be sound equitable and public policy grounds to meet the Service's criteria to qualify for a viable Public Policy Offer with respect to the entire liability. As to the penalty and interest portion of the liability "attributable to erroneous written advice by the Internal Revenue Service," however, sections 6404(f) and 6404(e) of the Code specifically provide for their full abatement.²⁵⁷ So, with the availability of an adequate alternative remedy, the submission of a Public Policy Offer would be unnecessary, if not more time consuming than requesting relief specifically granted under those sections. Therefore, in this example, the utility of a Public Policy Offer would be limited to the tax assessed on the prematurely drawn IRA savings.

Finally, a compromise of the tax liability would not be unfair to similarly situated taxpayers. This is because a taxpayer who seeks written advice from the Service does not do so to avoid paying tax. Moreover, even if the Service were to accept a zero dollar amount Offer, unlike a taxpayer who made a timely transfer of his IRA account and preserved all the inherent tax benefits, all future earnings on the tainted IRA funds of the compromising taxpayer would be taxable. From this perspective, the compromise of the entire tax liability could be viewed as an equitable offset for the valuable tax-free growth he lost as a result of following the Service's erroneous advice.

²⁵⁵ Treas. Reg. § 301.7122-1(c)(3)(iv) ex. 2 (as amended in 2003).

²⁵⁶ I.R.C. § 408(d)(3)(A) (2006).

²⁵⁷ See I.R.C. § 6404(f) (2006).

In the final analysis, rather than provide any meaningful guidance, the two examples in the final regulations actually exemplify the questionable practical utility of a Public Policy Offer. In a scenario similar to the one presented in the first example, it would be difficult to conceive of any equitable or public policy reason that would justify the compromise of a legitimately assessed tax liability regardless of the taxpayer's excusable inability to timely file or pay. Additionally, under no circumstances would such a compromise be considered to be fair to similarly situated full paying taxpayers. On the other hand, although in the second example a Public Policy Offer with respect to the tax triggered solely as the result of following the Service's erroneous written advice would clearly be viable, it would likely be a rare case in which the Service would make such a blatant error. Finally, with regard to the abatement of the penalties assessed in both examples, the availability of a specific remedy elsewhere would render the submission of a Public Policy Offer unnecessary.

ii. The Service Rejected Two Scenarios as Justifying a Public Policy Offer

As a further indication of the unviability of Public Policy Offers, the preamble addressed and rejected two potential scenarios in which a Public Policy Offer appeared to be in line with the intent of the legislative history. The first scenario involved penalties and interest that had accumulated as a result of undue delay by the Service in communicating with the taxpayer in a timely fashion. In the legislative history of RRA 1998, Congress contemplated the Service would use its "new authority" to compromise this type of case.²⁵⁸ In other words, Congress had singled out the accumulation of penalties and interest in that context as warranting a compromise based on public policy considerations. Interestingly, section 6404(e) of the Code—that pre-dated RRA 1998—would have provided similar relief to the taxpayer without the need to file an Offer.²⁵⁹ In that regard, Code

²⁵⁸ See H.R. REP. NO. 105-599, at 289 (1998) ("The conferees anticipate that . . . the [Service] may utilize this new authority to resolve longstanding cases by foregoing penalties and interest which have accumulated as a result of delay in determining the taxpayer's liability.").

²⁵⁹ The Tax Reform Act of 1986, Pub. L. No. 99-514, § 1563, 100 Stat. 2085.

section 6404(e)(1)(A) authorizes the Service to abate interest attributable “in whole or in part to any unreasonable error or delay by . . . [the Service] in performing a ministerial or managerial act, . . .”²⁶⁰

Due to the similarity of the relief sought, however, the Service was concerned that a Public Policy Offer based solely on a delay by the Service that would not have otherwise qualified for relief under section 6404(e) would undermine the integrity of that provision.²⁶¹ Consequently, the Service concluded that the acceptance of Public Policy Offers on that basis would not promote “effective tax administration.”²⁶² Yet, in spite of the Service’s concern, its position was in direct conflict with congressional intent as expressed in the legislative history. Obviously, any compromise based on equitable or public policy considerations would likely nullify some provision of tax law that would otherwise apply. Moreover, if Congress had intended the Service’s authority to compromise penalties and interest to be no greater than it had under section 6404(e), the grant of “new” authority would be meaningless. In any event, the Service’s position effectively eliminated an otherwise viable Public Policy Offer contemplated in the legislative history.²⁶³

The other scenario the Service rejected as the basis for a Public Policy Offer involved a disproportionate accumulation of interest and penalties attributable to actions of a third party that were beyond the taxpayer’s control. In that scenario, a Tax Matters Partner (TMP) of a partnership fraudulently sold shares of a sham business to unsuspecting partners.²⁶⁴ In the course of an audit, despite investigating the TMP for fraud, the Service allowed him to continue to represent the partnership.²⁶⁵ Ultimately, the Service’s assessment against the individual

²⁶⁰ I.R.C. § 6404(e)(1)(A) (2006) (defining ministerial and managerial acts as well as providing examples of situations warranting the abatement of interest).

²⁶¹ See T.D. 9007, 67 Fed. Reg. 48,025, 48,027 (July 23, 2002). For example, delays caused by an action by the Service not listed under section 6404(e) in the regulations or by a delay caused by a third party would not be grounds for statutory relief.

²⁶² *Id.*

²⁶³ See T.D. 9007, 67 Fed. Reg. at 48,027. Although the Service left open the possibility that a Public Policy Offer might be appropriate, it also indicated that such cases were expected to be rare. *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

partners included a substantial amount of interest and penalties. The issue was whether the Service should consider Public Policy Offers submitted by the innocent partners to compromise their portion of the interest and penalties resulting from the TMP's fraud. Without explaining its reasoning, the Service reached the disjointed conclusion that third-party fault would not be an appropriate basis for a Public Policy Offer, while also acknowledging (without explanation) that third-party fault could be the basis for such an Offer.²⁶⁶

C. The Service Quietly Created a New Type of Hardship Offer Based on Doubt as to Collectability with Special Circumstances

As discussed *supra*, to qualify for a Hardship Offer, a taxpayer had to establish that, in spite of her ability to pay the liability in full, she would suffer financial hardship sufficient to justify a compromise of an amount less than the total liability. In other words, only financially challenged taxpayers capable of paying the entire liability were eligible for a Hardship Offer. Consequently, a taxpayer incapable of paying the full liability who would suffer financial hardship if required to pay the Reasonable Collection Potential would not qualify. From an equitable perspective, it would be incongruous for the latter taxpayer not to be eligible to submit a Hardship Offer.²⁶⁷

In 2003, in an apparent effort to address this inequity, the Service created a new type of Offer based on doubt as to collectability with special circumstances (DCSC Offer). It did so, however not by amending the regulations, but pursuant to Revenue Procedure 2003-71.²⁶⁸ Inexplicably, nowhere in the revenue procedure self-described as an explanation and supplementation of the final regulations, did the Service

²⁶⁶ *Id.*

²⁶⁷ For example, assuming she could establish financial hardship, a taxpayer with the financial resources to pay an outstanding liability of \$100,000 would be eligible to submit a Hardship Offer of a lesser amount. Conversely, a similarly financially challenged taxpayer with the financial resources to pay only \$70,000 of the outstanding liability would not be eligible to submit a Hardship Offer of less than \$70,000.

²⁶⁸ Rev. Proc. 2003-71, § 4.02(2), 2003-2 C.B. 517. Although revenue procedures may be relied on by taxpayers for guidance as official interpretations of the Service, regulations are accorded the highest level of authority of any pronouncement issued by the Service. See Rev. Proc. 89-14, § 7.01(4), 1989-1 C.B. 814.

affirmatively announce the creation of the DCSC Offer. In fact, the genesis of the DCSC Offer was derived from a single sentence in the revenue procedure stating, "In some cases, the Service may accept an offer of less than the total reasonable collection potential of a case if there are special circumstances."²⁶⁹ The term "special circumstances" was not defined, and beyond that single sentence there was no further discussion of the DCSC Offer.

In a more detailed description of a DCSC Offer, the Manual characterized a DCSC Offer as another type of Hardship Offer.²⁷⁰ Unlike a Hardship Offer, however, to be eligible for a DCSC Offer, the taxpayer's Reasonable Collection Potential would have to be less than the outstanding liability. Otherwise, applying the same financial factors considered in a Hardship Offer, the taxpayer would have to establish that if compelled to pay the Reasonable Collection Potential, she would be unable to meet her necessary basic living expenses, and thus, an Offer of a lesser amount would be warranted.²⁷¹

VI. THE SERVICE'S RESTRICTIVE ACCEPTANCE POLICY OF ETA OFFERS REAFFIRMED ITS DE FACTO COMMITMENT TO MAXIMUM COLLECTION

A. The Limited Judicial Review of Offers Rejected by the Service at a Collection Due Process Hearing Provided by RRA 1998 Benefits the Service Rather than the Taxpayer

Prior to the enactment of RRA 1998, the taxpayer had no right to a judicial review of a rejected Offer. As part of a much larger reform of taxpayer rights, Congress granted taxpayers a number of procedural safeguards with respect to Service collection actions. Unfortunately for the taxpayer, as demonstrated throughout this Section of the Article, the so-called safeguards with regard to Offers have been proven to be more beneficial to the Service than to the taxpayer. Sequentially, a typical fact pattern would be as follows: The Service commences an action against the taxpayer to collect an assessed tax liability by sending

²⁶⁹ Rev. Proc. 2003-71, § 4.02(2), 2003-2 C.B. 517.

²⁷⁰ See IRM 5.8.4.3 (Sept. 23, 2008).

²⁷¹ *Id.* § 5.8.4.3(3)-(4).

the taxpayer a notice of the filing of a tax lien²⁷² and/or a notice of intent to levy on the taxpayer's property.²⁷³ Pursuant to sections 6320(b) and 6330(b) of the Code, the taxpayer may request a collection due process hearing (CDP Hearing) before a Service appeals officer to present less intrusive collection alternatives such as the submission of an Offer.²⁷⁴ If the appeals officer rejects the taxpayer's Offer, she would issue a notice of determination explaining her reasons for rejection.²⁷⁵ Finally, within thirty days of the notice of determination, the taxpayer is entitled to file a petition in Tax Court for a judicial review of the Service's decision.²⁷⁶

Significantly, the standard of review of the appeal is limited to whether the Service abused its discretion in rejecting the Offer as a collection alternative,²⁷⁷ and not whether the Offer should have been accepted,²⁷⁸ or what amount would have been an acceptable Offer.²⁷⁹ In other words, even if the Tax Court determined the Service had abused its discretion, it has no authority to compel the Service to accept the taxpayer's Offer. Instead, the case would be remanded back to an appeals officer for a new hearing to reconsider the taxpayer's Offer.²⁸⁰

Although on the surface, judicial review would have appeared to benefit a taxpayer who heretofore had no forum to challenge the propriety of an Offer rejected by the Service, the consequences of judicial review, however, have been decidedly one-sided in favor of the Service. In cases in which the Service's rejection of the taxpayer's Offer is upheld, the decision not only allows the Service to proceed with collection against the taxpayer, it essentially validates the Service's rationale for rejecting the taxpayer's Offer. Consequently, a Tax Court decision in the Service's favor could

²⁷² See I.R.C. § 6320(a) (2006).

²⁷³ *Id.*

²⁷⁴ See I.R.C. §§ 6320(b), 6330(b) (2006).

²⁷⁵ See Treas. Reg. § 301.6330-1(e)(3)(vi), Q&A (E8) (2003).

²⁷⁶ See I.R.C. § 6330(d)(1). If the Tax Court does not have subject matter jurisdiction over the underlying tax, the taxpayer must file her appeal in district court. See I.R.S. Chief Couns. Notice CC 2006-19 (Aug. 18, 2006).

²⁷⁷ See *Sego v. Comm'r*, 114 T.C. 604, 610 (2000); *Goza v. Comm'r*, 114 T.C. 176, 182 (2000).

²⁷⁸ See *Woodral v. Comm'r*, 112 T.C. 19, 23 (1999).

²⁷⁹ See *Murphy v. Comm'r*, 125 T.C. 301, 320 (2005).

²⁸⁰ See *Lunsford v. Comm'r*, 117 T.C. 183, 189 (2001).

potentially discourage taxpayers with similar disputes with the Service from submitting Offers. Moreover, even if the taxpayer were to prevail, the Tax Court's remand of the case back to the appeals officer for a second CDP Hearing would not guarantee the acceptance of her Offer. In fact, the appeals officer might find other reasons to reject it.

B. The Ninth Circuit Affirmed Sixteen Tax Court Decisions Holding the Service Did Not Abuse Its Discretion in Rejecting Public Policy and Hardship Offers of Partners Victimized by the Fraudulent Activities of a Tax Shelter Promoter

In *Keller v. Commissioner*²⁸¹ exemplified judicial deference to the Service's rationale for rejecting Public Policy and Hardship Offers based upon the fraudulent actions of a third party. In *Keller*, the Ninth Circuit affirmed the consolidated appeals of sixteen Tax Court memorandum opinions each holding that the Service did not abuse its discretion in rejecting the Public Policy or Hardship Offers submitted by the taxpayers who were victimized by the fraudulent activities of a tax shelter promoter.

1. The Service's Twenty-Year Mission to Unravel the Hoyt Partnerships Cumulated in the Assessment of a Substantial Amount of Tax, Interest, and Penalties Against the Taxpayer/Partners

The facts underlying the Service's twenty-year investigation of a fraudulent partnership cumulating in the assessment of a substantial amount of tax, interest, and penalties against the taxpayer/partners were as follows: Between 1971 and 1998, thousands of investors participated in more than 100 cattle and sheep-breeding partnerships (touted as "The 1,000 lb Tax Shelter"),²⁸² organized and operated by Walter J. Hoyt III (Hoyt Partnerships).²⁸³ For much of that period, Hoyt served as the

²⁸¹ 568 F.3d 710 (9th Cir. 2009).

²⁸² *Id.* at 714.

²⁸³ *River City Ranches #1 Ltd. v. Comm'r*, 85 T.C.M. (CCH) 1365, 1367-68 (2003).

partnerships' TMP,²⁸⁴ and as an enrolled agent, also represented many of the partners before the Service.²⁸⁵

Over the years, the partners of the Hoyt Partnerships received distributive shares of tax losses and credits that were ultimately determined to be illegitimate.²⁸⁶ Prior to that day of reckoning, however, the Tax Court's 1989 decision in *Bales v. Commissioner*²⁸⁷ appeared to validate the legitimacy of the Hoyt Partnerships. In *Bales*, the Service unsuccessfully challenged the economic substance of partnership transactions underlying those losses and credits.²⁸⁸

Yet, notwithstanding the adverse *Bales* decision, the Service continued to aggressively investigate the Hoyt Partnerships for fraudulently overstating the number and value of animals the partnerships purportedly owned.²⁸⁹ In 1993, the Service and the Hoyt Partnerships executed a global settlement agreement for tax years 1980-1986, establishing a value for each cow and a formula to be used to determine the actual number of cows owned by each Hoyt Partnership.²⁹⁰ Subsequently, to advance his own self-interests, Hoyt unilaterally allocated deductions and income in a manner that was favorable to certain partners and detrimental to other partners. In an ensuing Tax Court case, the Service successfully challenged the propriety of Hoyt's allocations.²⁹¹

Also, between 1993 and 1999, a number of federal agencies conducted their own fraud investigations of the Hoyt Partnerships.²⁹² In 1997, the Service disbarred Hoyt as an enrolled agent, followed by the Tax Court removing him as the TMP of the Hoyt Partnerships.²⁹³ Subsequently, in two post-1986 tax year cases decided in 1999 and 2000, the Tax Court disallowed certain tax benefits claimed by three sheep partnerships²⁹⁴ and

²⁸⁴ *Id.* at 1369.

²⁸⁵ *Id.*

²⁸⁶ *Keller v. Comm'r*, 556 F.3d 1056, 1057 (9th Cir. 2009).

²⁸⁷ 58 T.C.M. (CCH) 430, 431 (1989).

²⁸⁸ *Id.*

²⁸⁹ *River City Ranches #1 Ltd.*, 85 T.C.M. (CCH) at 1372.

²⁹⁰ *Keller v. Comm'r*, 568 F.3d 710, 714 (9th Cir. 2009).

²⁹¹ *Shorthorn Genetic Eng'g 1982-2, Ltd. v. Comm'r*, 72 T.C.M. (CCH) 1306 (1996).

²⁹² *River City Ranches #1 Ltd.*, 85 T.C.M. (CCH) at 1372-74.

²⁹³ *Id.* at 1369.

²⁹⁴ *River City Ranches #4 v. Comm'r*, 77 T.C.M. (CCH) 2245 (1999).

three cattle partnerships,²⁹⁵ respectively. Finally, in 2001, Hoyt was convicted on numerous counts of fraud and money laundering and was ordered to pay restitution in excess of \$102 million to the investor victims of the Hoyt Partnerships.²⁹⁶

Ultimately, as is relevant to the *Keller* case, after making final partnership administrative adjustments to the Hoyt Partnerships, the Service assessed deficiencies, including a substantial amount of interest and penalties against each of the sixteen taxpayer/partners.²⁹⁷ Thereafter, each taxpayer submitted a Public Policy or Hardship Offer at a CDP Hearing that was rejected by an appeals officer.²⁹⁸ As discussed *infra*, in all the decisions reviewing the Service's rejections of the taxpayers' Offers, the Tax Court held that the Service had not abused its discretion in rejecting their Offers.²⁹⁹

a. The Ninth Circuit Affirmed the Tax Court Decisions Holding that the Service's Rejection of the Taxpayers' Public Policy Offers Based on the Fraudulent Actions of Hoyt and an Undue Delay in the Service's Resolution of Their Tax Liability Was Not an Abuse of Discretion

In the Public Policy Offers submitted by the taxpayers, they sought to compromise the excessive interest and penalties assessed against them based on the assertion that they were victims of the fraudulent actions of Hoyt.³⁰⁰ In rejecting the taxpayers' position, the Ninth Circuit adopted the Tax Court's conclusion that their equity and public policy arguments were negated by their culpability in investing in the Hoyt Partnerships, which was marketed for its tax benefits and touted as a "1,000 lb

²⁹⁵ *Durham Farms #1 v. Comm'r*, 79 T.C.M. (CCH) 2009 (2000).

²⁹⁶ *United States v. Barnes*, No. 3:98-00529-JO-04 (D. Or. July 11, 2001), *aff'd sub nom.* *United States v. Hoyt*, 47 F. App'x 834 (9th Cir. 2002).

²⁹⁷ *See, e.g., Johnson v. Comm'r*, 93 T.C.M. (CCH) 885 (2007); *Hubbart v. Comm'r*, 93 T.C.M. (CCH) 870 (2007); *Ertz v. Comm'r*, 93 T.C.M. (CCH) 696 (2007).

²⁹⁸ *Keller v. Comm'r*, 568 F.3d 710, 715 (9th Cir. 2009).

²⁹⁹ *Id.*

³⁰⁰ Ironically, in the preamble of the final regulations, the Service stated that it would not consider Public Policy Offers in similar factual situations. *See* Treas. Reg. § 301.7122-1 (as amended in 2003); and *supra* Section V.B.2.B.ii for a more detailed discussion.

Tax Shelter.”³⁰¹ Also, in a number of prior opinions, the Ninth, Sixth, and Tenth Circuits had uniformly upheld negligence penalties the Service had assessed against Hoyt partners.³⁰² Thus, in *Keller*, the Ninth Circuit found it anomalous to hold a taxpayer statutorily accountable for penalties in one decision and yet denounce the Service’s rejection of an Offer of a lesser amount based on public policy or equity considerations in another decision.³⁰³ Finally, quoting from *Fargo v. Commissioner*,³⁰⁴—a case factually similar to *Keller*—the court concluded that the Service’s rejection of such Offers would encourage taxpayers who contemplate investing in tax shelters to “research future investments more carefully and to keep in better contact with financial agents (such as TMPs).”³⁰⁵ Similarly, the Tax Court had stated that the acceptance of a Public Policy Offer under those circumstances “would place the [Service] in the unenviable role of an insurer against poor business decisions by taxpayers, reducing the incentive for taxpayers to investigate thoroughly the consequences . . . into which they enter.”³⁰⁶

Alternatively, the taxpayers contended a Public Policy Offer was appropriate because of the Service’s undue delay in resolving their tax liability. Specifically, the taxpayers argued that it took the Service longer than the “average’ amount of time it takes to conclude [the investigation of] a tax shelter case.”³⁰⁷ According to the taxpayers, ten years was the appropriate amount of time. In support of their position, the taxpayers cited the legislative history of RRA 1998 in which the conferees “anticipate[d] that, among other situations, the [Service] may utilize this new authority to resolve long standing cases by foregoing penalties and interest which have accumulated as a result of delay in determining the taxpayer’s liability.”³⁰⁸

³⁰¹ *Keller*, 568 F.3d at 721.

³⁰² *Id.* (citations omitted).

³⁰³ *Id.* at 719.

³⁰⁴ 447 F.3d 706 (9th Cir. 2006).

³⁰⁵ *Keller*, 568 F.3d at 721 (quoting *Fargo*, 447 F.3d at 714).

³⁰⁶ See, e.g., *Catlow v. Comm’r*, 93 T.C.M. (CCH) 946 (2007); *Johnson v. Comm’r*, 93 T.C.M. (CCH) 885 (2007); *Hubbart v. Comm’r*, 93 T.C.M. (CCH) 870 (2007); *Ertz v. Comm’r*, 93 T.C.M. (CCH) 696 (2007).

³⁰⁷ *Keller*, 568 F.3d at 720.

³⁰⁸ *Id.* (citing H.R. REP. NO. 105-599, at 288-89 (1998)).

In rejecting the taxpayers' arguments, the Ninth Circuit refused to adopt an arbitrary amount of time to resolve such a case as "requiring the [Service] to abate penalties and interest once an 'average' amount of time for 'average' [tax] shelters has passed."³⁰⁹ Moreover, the Ninth Circuit disputed the taxpayers' interpretation of the legislative history, emphasizing that Congress had used the word "may" and not "must" in the context of the Service's authority to forego penalties and interest.³¹⁰ Finally, the Ninth Circuit concluded that the Service did not abuse its discretion in rejecting the Public Policy Offers because full payment "would encourage future investors to take care before investing in similar tax shelters, whereas less than full payment would discourage potential investors from researching and monitoring similar investments."³¹¹

In the final analysis, the Ninth Circuit's holding in *Keller*—as reinforced by its earlier holding in *Fargo*—as well as the consistency of the Tax Court decisions in favor of the Service, portend the questionable utility of Public Policy Offers. Although those cases involved disallowed tax shelter losses and credits, it is likely that in future judicial reviews of Offer rejections, courts would defer to the Service's dismissal of the taxpayer's equity arguments based on any plausible counterbalancing reason.

C. Keller and the Tax Court Opinions it Affirmed Validated the Service's Position that Hardship Offers Must be Considered Within the Framework of Present Circumstances

1. Speculative Future Medical Expenses not Deemed to be a Financial Economic Hardship

In *Keller*, nine of the sixteen taxpayers also submitted Hardship or DCSC Hardship Offers—collectively referred to as "Hardship Offers."³¹² Generally, the taxpayers were retired or

³⁰⁹ *Keller*, 568 F.3d at 720.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* at 717 n.8. Although the Ninth Circuit opinion listed ten taxpayer/partners, the DCSC Hardship Offer submitted by the Lindleys was deemed to be waived, and thus, it was not reviewed by the Tax Court. See *Lindley v. Comm'r*, 92 T.C.M. (CCH) 363 (2006).

near retirement with health issues and offered an amount less than their respective individual Reasonable Collection Potential based on the necessity of retaining financial resources for anticipated future medical expenses. Although the severity of the taxpayers' medical condition varied,³¹³ it would appear at first blush, that the Hardship Offers submitted by taxpayers with the more severe medical issues had merit. Pursuant to section 301.7122-1(c)(3)(i)(A), a Hardship Offer would be appropriate if it was reasonably foreseeable that a taxpayer with a serious medical condition that rendered her incapable of earning a living would need all of her financial resources to provide for her care and support during the course of the condition.

Although each taxpayer was able to document their medical conditions, the fatal flaw in each Offer, however, was the failure to establish any correlation between the amount of financial resources the taxpayers sought to retain (i.e., the difference between the taxpayer's Reasonable Collection Potential and the amount offered) and the unspecified amount needed to cover future medical expenses. In each instance, the taxpayer's proof consisted of a "retirement analysis" in which there were "general assertions about the increase of medical costs as people age and about the need for some seniors to seek in-home care or nursing home care or to make their houses handicapped assessable."³¹⁴ For that reason, each taxpayer's Hardship Offer was rejected by the appeals officer.³¹⁵

Upon review, the Tax Court uniformly held that the Service did not abuse its discretion, finding that the appeals officers' "determination was based on a reasonable application of the

³¹³ Compare *Hubbart v. Comm'r*, 93 T.C.M. (CCH) 870, 871 (2007) (heart problems for which taxpayer/partner had an angioplasty and angiogram, required thirty-five sessions of external counterpulsation system and would likely require heart surgery, and ulcerative colitis suffered by wife requiring a yearly colonoscopy), and *Carter v. Comm'r*, 93 T.C.M. (CCH) 861, 863 (2007) (degenerative back problems suffered by taxpayer/partner and congenial birth defect, affecting kidney and bladder function, plus collagenous colitis, sarcoidosis, Wegner's disease, and atrial fibrillation suffered by wife), with *Smith v. Comm'r*, 93 T.C.M. (CCH) 1047, 1051 (2007) (no specific medical issues other than those associated with aging), and *Johnson v. Comm'r*, 93 T.C.M. (CCH) 885, 886 (2007) (arthritis suffered by taxpayer/partner for which medication was required and high blood pressure suffered by wife for which medication was required).

³¹⁴ See, e.g., *Johnson*, 93 T.C.M. (CCH) at 889; *Carter*, 93 T.C.M. (CCH) at 866.

³¹⁵ *Id.*

guidelines, [and thus] . . . declin[ing] to second-guess.”³¹⁶ Moreover, the Tax Court accepted the Service’s contention that any Offer “must be considered within the framework of present facts.”³¹⁷ Thus, unless the taxpayer quantified the amount necessary for future medical care, it would be considered speculative, and, therefore, not a present financial hardship.³¹⁸

2. Future Estimated Medical Expenses Not to be Factored into the Computation of Reasonable Collection Potential

As discussed *supra*, a taxpayer’s Reasonable Collection Potential is the sum of her net equity plus her future income, less an allowance for necessary living expenses projected, over some measure of time.³¹⁹ Thus, the higher the amount allowed for necessary living expenses, the lower the amount of the taxpayer’s Reasonable Collection Potential. In *Keller*, several taxpayers objected to the appeals officer’s computation of their Reasonable Collection Potential as being too high due to the officer not including future medical expenses.³²⁰ Because these expenses were undocumented, just as the Service rejected the taxpayers’ Hardship Offers for failing to quantify estimated medical expenses, the appeals officers refused to grant an allowance for “possible future . . . [medical] expenses” because they “were ‘general projections from the taxpayers’ representative and may never, in fact, be incurred’”³²¹ So, based on the judicial consensus validating the Service’s policy on this issue, it is unlikely that future courts would find the Service abused its discretion by refusing to consider speculative expenses either as the basis for a Hardship Offer or as an additional allowance in the computation of a taxpayer’s Reasonable Collection Potential.

³¹⁶ *Smith*, 93 T.C.M. (CCH) at 1050.

³¹⁷ *Johnson*, 93 T.C.M. (CCH) at 889.

³¹⁸ See *Fargo v. Comm’r*, 447 F.3d 706, 710 (9th Cir. 2006) (The Ninth Circuit rejected the taxpayers’ contention that they needed \$90,000 a year to pay for medical expenses related to the taxpayer/husband’s dementia. The taxpayers provided no documentation substantiating the need for nursing care or other expenses.).

³¹⁹ See IRM 5.8.4.3.1 (June 1, 2010).

³²⁰ See *Smith*, 93 T.C.M. (CCH) at 1051; *Estate of Andrews v. Comm’r*, 93 T.C.M. (CCH) 891, 894 (2007); *Johnson*, 93 T.C.M. (CCH) at 889; *Ertz v. Comm’r*, 93 T.C.M. (CCH) 696, 701 (2007); *Barnes v. Comm’r*, 92 T.C.M. (CCH) 31, 35 (2006).

³²¹ *Estate of Andrews*, 93 T.C.M. (CCH) at 894.

D. Perceived Unfair Application of Tax Laws Not an Acceptable Basis for a Public Policy Offer

Because in some instances the application of a particular tax law may be unintentionally inequitable, an aggrieved taxpayer might consider submitting a Public Policy Offer as an appropriate means to compromise the resulting harsh tax consequences. If the Service were to reject the taxpayer's Offer at a CDP Hearing, a petition filed in Tax Court might provide the taxpayer with a "soap box" from which to protest the inequities of certain tax laws. Unfortunately, the taxpayers in *Speltz v. Commissioner* failed on both counts as the Tax Court affirmed the Service's rejection of such an Offer based on the inequitable consequences of an alternative minimum tax liability that was egregiously disproportionate to the taxpayers' economic income.³²²

In *Speltz*, one of the taxpayers was employed as a senior manager of a company earning an annual wage of \$75,000.³²³ In 2000, in addition to his regular compensation, the taxpayer also received incentive stock options (ISOs) to acquire his employer's stock.³²⁴ In that same year, the taxpayer exercised the ISOs to purchase 2070 shares of stock for \$34,254, or \$711,118 below the then market value of the stock.³²⁵

Subsequently, the stock price dropped precipitously from approximately \$105 per share on March 10, 2000, to less than a dollar per share on December 30, 2000. In 2002, the taxpayer sold all the shares he had acquired for only \$1647.³²⁶ Despite the large decline in the value of the stock for the 2000 tax year, the \$711,118 spread between the option price and the market value of the stock at the time of exercise was included in the computation of the alternative minimum tax (AMT). As a result, the taxpayers' AMT liability was \$224,869, as compared to their regular tax liability of \$18,678.³²⁷

In November 2001, after making several installment payments to reduce their AMT liability to approximately

³²² 124 T.C. 165 (2005).

³²³ *Id.* at 166.

³²⁴ *Id.* at 165.

³²⁵ *Id.* at 166.

³²⁶ *Id.*

³²⁷ *Id.*

\$125,000, the taxpayers submitted a Public Policy Offer of \$4457.³²⁸ After a revenue officer rejected that Offer, the taxpayers were issued a Notice of Federal Tax Lien Filing.³²⁹ At a CDP Hearing, the taxpayers' attorney noted the unfairness of AMT as it applied to his clients and asked the appeals officer whether there was any pending legislation that would retroactively change the way AMT was computed.³³⁰ By a letter dated February 13, 2003, the appeals officer answered in the negative; and on August 12, 2003, he sent a notice of determination again rejecting the taxpayers' Offer.³³¹

On appeal to the Tax Court, the taxpayers argued the inequity of the "rote application" of the AMT computation by which they were compelled to include over \$711,000 of AMT income in spite of actually receiving only \$1647, an effective tax rate of 220%.³³² In cases of such blatant unfairness, the taxpayers contended that Congress had intended the Service to use its public policy compromise authority to provide necessary relief.

Despite being sympathetic to the taxpayers' plight, the Tax Court rejected the contention that section 7122 authorized the Service to override other tax law provisions that were perceived to be unfair or inequitable.³³³ In doing so, the Tax Court explained that remedying the inequitable consequences of tax laws was a function of Congress, not the judiciary.³³⁴ Accordingly, the Tax Court's holding in *Speltz* should put taxpayers on notice that Public Policy Offers are not a viable option to redress the unintended harsh tax consequences resulting from the application of any particular tax law.

³²⁸ *Id.* at 166-67. Although, on IRS Form 656 the taxpayers checked the box for "Doubt as to Collectibility," they also included a statement in which they asserted that they were victimized by the impact of AMT. *Id.* at 167.

³²⁹ *Id.* at 167-68.

³³⁰ *Id.* at 168-69.

³³¹ *Id.* at 169.

³³² *Id.* at 175.

³³³ *Id.* at 177.

³³⁴ *Id.* at 176 (The Seventh Circuit stated, "it is not a feasible judicial undertaking to achieve global equity in taxation And if it were a feasible judicial undertaking, it still would not be a proper one, equity in taxation being a political rather than a jural concept." (quoting *Kenseth v. Comm'r*, 259 F.3d 881, 885 (7th Cir. 2001))).

VII. THE COURTS ARE SPLIT ON WHETHER THE SERVICE CAN BE
COMPELLED TO CONSIDER THE OFFER OF A TAXPAYER IN
BANKRUPTCY

In February 1997, the Service reversed its policy of considering Offers submitted by taxpayers in bankruptcy³³⁵ based on its view that doing so was not in the best interest of the government.³³⁶ Instead, the Service determined that the resolution of such a taxpayer's tax obligations was best accomplished "[with]in the context of the bankruptcy proceeding and in accordance with applicable bankruptcy law and procedures."³³⁷ Moreover, as one court noted, in a Chapter 13 or Chapter 11 proceeding, the Service could rationally decide that it should not consider an Offer "in isolation from the terms of a proposed plan and from the plan confirmation process."³³⁸ Moreover, even if the Service were to accept an Offer submitted by a taxpayer in bankruptcy, there would be no guarantee that the taxpayer would be able to comply with its terms based on the viability of a plan the Bankruptcy Court may or may not approve.³³⁹

In a number of Bankruptcy Court cases, taxpayers challenged the Service's policy of refusing to consider Offers based solely on their status as a debtor in bankruptcy as being inappropriately discriminatory in violation of bankruptcy law. Although no court has ever held that the Service must accept an Offer, the issue was whether the Service can be compelled to at least consider the Offer of a taxpayer in bankruptcy. As discussed in this Section, there is a split of authority on this issue.

*A. Cases Holding that the Service Must Consider the Offer of a
Taxpayer in Bankruptcy*

In *In re Mills*, sometime in 1996, taxpayers with a substantial amount of tax debt filed a Chapter 13 bankruptcy

³³⁵ See *In re Mills*, 240 B.R. 689, 692 (Bankr. S.D. W. Va. 1999); Rev. Proc. 2003-71, § 5.04(3), 2003-2 C.B. 517, 518.

³³⁶ I.R.S. Chief Couns. Notice CC-2004-25 (July 12, 2004).

³³⁷ *Id.*

³³⁸ *In re* 1900 M Rest. Assocs., Inc., 319 B.R. 302, 311 (Bankr. D.D.C. 2005).

³³⁹ *Id.*

petition.³⁴⁰ On or about November 6, 1997, several months after the taxpayers had filed their third amended plan, the taxpayers submitted an Offer to the Service.³⁴¹ Consistent with its then new policy of not considering an Offer of a taxpayer in bankruptcy, the Service did not process the taxpayers' Offer.³⁴²

Consequently, the taxpayers filed an adversary proceeding to compel the Service to consider their Offer, contending that the Service's change of policy was an act of inappropriate governmental discrimination against bankruptcy debtors. Specifically, section 525(a) of the Bankruptcy Code prohibited any governmental act that would revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant with regard to an individual, solely because of her filing for bankruptcy.³⁴³ In making their case, the taxpayers equated an Offer to a license to propose "alternative treatment of their tax obligations to the government."³⁴⁴ Therefore, because the granting of such a license by the Service required the submission of an Offer pursuant to provisions of section 7122 of the Code, the Service's refusal to consider the Offers of taxpayers in bankruptcy was prohibited governmental discrimination.³⁴⁵

The Bankruptcy Court held in favor of the taxpayers for the following reasons: First, although the Bankruptcy Court did not go so far as to characterize an Offer as a "license," it broadly interpreted section 525(a) to prohibit "bankruptcy-based discrimination 'that can seriously affect the debtors' livelihood or fresh start.'"³⁴⁶ Based upon that expansive view, the Bankruptcy Court concluded that the Service's refusal policy was prohibitive discrimination within the meaning of that section.³⁴⁷ Second, while the Bankruptcy Court acknowledged that the Service has complete discretion to decide whether to accept or reject an Offer; it determined that the Service had a mandatory statutory

³⁴⁰ 240 B.R. 689 (Bankr. S.D. W. Va. 1999).

³⁴¹ *Id.* at 691.

³⁴² *Id.* at 691-92.

³⁴³ *Id.* at 693.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 695 (citations omitted).

³⁴⁷ *Id.* at 697.

obligation to consider Offers.³⁴⁸ For that reason, it would be inappropriate for the Service to refuse to consider the Offer of a taxpayer in bankruptcy.

In re Macher was the second major case in which the Service was ordered to consider the Offer of a taxpayer in bankruptcy, albeit based on a different rationale than the *Mills* case.³⁴⁹ In *Macher*, a Chapter 11 case, the Bankruptcy Court concluded that the Service's policy did not violate section 525(a) of the Bankruptcy Code because "a statutorily authorized procedure by which a taxpayer may submit an offer to the government . . . and have the government consider such [an] offer is not a 'license, permit, charter, franchise or other similar grant . . .'"³⁵⁰

Instead, the Bankruptcy Court determined that the Service's refusal policy conflicted with the broader policies underlying the Bankruptcy Code, particularly Chapter 11 reorganizations.³⁵¹ The Bankruptcy Court noted that Chapter 11 reorganizations typically involved significant negotiations between the debtor and creditors because it was often in all the parties' best interest to allow the debtor to reorganize and restructure its obligations to be able to remain in business. Thus, the Service's refusal policy would thwart that process because it would be difficult for the debtor to deal with its other creditors without knowing what concessions the Service might be willing to make. Consequently, if the taxpayer was compelled to obtain the dismissal of its bankruptcy in order to submit an Offer, the taxpayer would lose the benefit of the fundamental purpose of bankruptcy, i.e., a fresh start.³⁵² Apparently, applying its equitable powers under section 105(a) of the Bankruptcy Code "to issue any order . . . that is necessary or appropriate to carry out the provisions of this title," the Bankruptcy Court ordered the Service to consider the taxpayer's Offer.³⁵³

³⁴⁸ *Id.* at 696.

³⁴⁹ No. 00-03659-WSR-11, 2003 WL 23169807 (Bankr. W.D. Va. June 5, 2003).

³⁵⁰ *Id.* at *1.

³⁵¹ *Id.* at *2.

³⁵² *Id.*

³⁵³ In its opinion, the bankruptcy court did not specifically cite section 105(a) as the statutory authority for the order. In affirming the decision, however, the district court surmised it was the basis for the bankruptcy court's order. *In re Macher*, 303 B.R. 798, 801 (Bankr. W.D. Va. 2003).

B. Cases Holding the Service Has No Duty to Consider the Offer of a Taxpayer in Bankruptcy

In *In re 1900 M Restaurant Associates, Inc.*,³⁵⁴ the Bankruptcy Court rejected the holdings of the *Mills* and *Macher* decisions and held that the Service did not have a duty to consider the Offer of a taxpayer in bankruptcy. Similar to *Macher*, the taxpayer filed an adversary proceeding to compel the Service to consider its Offer after the taxpayer had commenced a Chapter 11 bankruptcy.³⁵⁵

In rendering its decision, the Bankruptcy Court agreed with the holding in *Macher* that the Service's refusal policy was not a governmental act that violated section 525(a) of the Bankruptcy Code because an Offer was not a grant that was similar to a license, permit, charter or franchise.³⁵⁶ Applying the reasoning of a Second Circuit opinion that had defined the word "grant" for purposes of section 525(a) as a transfer of a property right or an agreement that creates certain rights,³⁵⁷ the Bankruptcy Court concluded that an Offer was neither, and thus did not fit within that definition.³⁵⁸

After concluding that the Service's refusal policy was not a discriminatory governmental act, the Bankruptcy Court considered whether the general equitable powers of section 105(a) of the Bankruptcy Court were broad enough to order the Service to consider the taxpayer's Offer. Pursuant to section 105(a), "the court may issue any order, process, or judgment that is necessary and appropriate to carry out the provisions of [the Bankruptcy Code]." In holding in the negative, the Bankruptcy Court compared a section 105(a) order for relief "in the nature of mandamus."³⁵⁹ So, to qualify for that type of relief, the taxpayer would have to establish that it had: 1) a clear right to have its Offer considered; 2) the Service had a clear duty to consider the

³⁵⁴ 319 B.R. 302 (Bankr. D.D.C. 2005).

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 305.

³⁵⁷ *Stolz v. Brattleboro Hous. Auth.*, 315 F.3d 80 (2d Cir. 2002).

³⁵⁸ *In re 1900 M Rest. Assocs., Inc.*, 319 B.R. at 306.

³⁵⁹ *Id.*

taxpayer's Offer; and 3) there was no adequate alternative remedy available to the taxpayer.³⁶⁰

As to the first two requirements, the Bankruptcy Court determined that the Service's discretionary authority under section 7122 of the Code also included deciding whether an Offer should be processed. Thus, for that reason, the taxpayer had no right, and the Service had no duty, to consider its Offer.³⁶¹ Finally, with respect to the third requirement, the Bankruptcy Court found that the Service's Offer refusal policy did not foreclose negotiation with the Service. In this case, the taxpayer's adequate alternative remedy was its ability to negotiate its tax liability with the Service through the plan confirmation process.³⁶²

In the alternative, the Bankruptcy Court addressed the issue of whether the authority of section 105(a) was broad enough to order the Service to consider the taxpayer's Offer so as to carry out the fresh start principle and common sense realities of bankruptcy reorganizations. In dispensing with this issue, the Bankruptcy Court determined that an order issued under section 105(a) would be appropriate only if necessary to preserve an identifiable right conferred elsewhere in the Bankruptcy Code.³⁶³ In this instance, the Bankruptcy Court did not consider the fresh start principle and the common sense realities of bankruptcy reorganizations that favor their successful completion as an identifiable right under the Bankruptcy Code.³⁶⁴ Moreover, the court noted that the Bankruptcy Code also grants creditors certain rights in the plan confirmation process. Accordingly, the effect of an order compelling the Service to consider an Offer outside of the bankruptcy process would undermine, rather than advance, those provisions of the Bankruptcy Code protecting creditors.³⁶⁵

³⁶⁰ *Id.* at 307.

³⁶¹ *Id.* at 307-09.

³⁶² *Id.* at 312-13.

³⁶³ *Id.* at 314.

³⁶⁴ *Id.* 314-15.

³⁶⁵ See *id.* at 313-15; see also *In re Shope*, 347 B.R. 270 (Bankr. S.D. Ohio 2006); *In re Uzialko*, 339 B.R. 579 (Bankr. E.D. Pa. 2006) (other cases following the court's holding in *In re 1900 M Rest. Assocs., Inc.*).

VIII. THE TAX INCREASE PREVENTION AND RECONCILIATION
ACT OF 2005 REQUIRES A TAXPAYER TO PUT HER MONEY WHERE
HER OFFER IS

By 2005, Congress should have realized that the Service's stringent and restive acceptance standards had made Hardship Offers and Public Policy Offers unattainable for most taxpayers. Therefore, it was clear that the Service's Offer policy had failed to live up to the ambitious promise of the legislative history of RRA 1998 to incorporate financial hardship, equity, and public policy considerations into the Offer acceptance standards. Yet, if Congress had disapproved, it could have enacted legislation that would have required the Service to ease its standards in a manner consistent with the legislative promise. Instead, Congress took the opposite approach with the enactment of the Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA).³⁶⁶

Unlike RRA 1998, none of the TIPRA amendments to section 7122 of the Code were designed to make Offers more attainable for taxpayers. In fact, TIPRA incorporated an effective collection tool into the Offer process never before available to the Service that did not require it to engage in aggressive collection action. As a fundamental change to the Offer process, TIPRA provides that no Offer will be considered by the Service unless it included a non-refundable payment(s) to be applied to a taxpayer's outstanding tax liability. In other words, because the payments are treated as "tax" payments, none of the amounts paid to the Service by the taxpayer would be refundable whether or not the Service accepts the Offer.³⁶⁷

Specifically, under newly enacted section 7122(c)(1)(A) of the Code, a lump sum Offer (payable in five or fewer installments) must be accompanied with a payment of twenty percent of the amount offered.³⁶⁸ Additionally, pursuant to section 7122(c)(1)(B) of the Code, a periodic payment Offer (payable in six or more installments) must be accompanied not only with the first proposed installment payment, but also all subsequent proposed installment payments must be made during the entire period in

³⁶⁶ Pub. L. No. 109-222, § 509, 120 Stat. 345 (2006).

³⁶⁷ See I.R.C. § 7122(c)(2)(A) (2006).

³⁶⁸ I.R.C. § 7122(c)(1)(A)(ii) (2006).

which the Service is evaluating the Offer. In the event the taxpayer fails to make a proposed installment, the Service may treat the Offer as being withdrawn with all monies paid in to be applied to the taxpayer's outstanding liability.³⁶⁹

For example, if a taxpayer submits a periodic payment Offer of \$36,000, payable in \$1000 monthly installments, she must pay \$1000 with the Offer plus a \$1000 installment payment each month thereafter during the time the Offer is being considered. If after twenty-two months the Service rejects the Offer, the \$22,000 paid by the taxpayer would be applied to her outstanding tax liability. Alternatively, if before the Service rejects or accepts her Offer, the taxpayer stops making installment payments after the twentieth month, the Service could deem her Offer to be withdrawn and apply the \$20,000 paid by the taxpayer against her tax liability.

So, it is clear that TIPRA has stacked the collection cards in the Service's favor. Unless the taxpayer is willing to put her money where her Offer is, she has no right to make an Offer, and thus, the Service would be free to pursue collection. Conversely, if the taxpayer agrees to put her money where her periodic payment Offer is, the Service could collect up to twenty-four months of installment payments without committing to accept or reject the Offer.³⁷⁰ Yet, even if the Service were to then reject the Offer, it would have potentially received a substantial amount of funds voluntarily paid by the taxpayer. In the final analysis, there should be no doubt that regardless of the modifications made to the Offer process over the years, collection of taxes remains the highest priority to the Service and Congress.

CONCLUSION

For the entire history of federal income taxation, the Congress has empowered the Service to collect taxes, penalties,

³⁶⁹ I.R.C. § 7122(c)(1)(B)(ii) (2006). There is, however, an exception for low-income taxpayers who would not be required to make payments as a condition of submitting an Offer. See I.R.C. § 7122(c)(2)(C) (2006).

³⁷⁰ Pursuant to newly enacted section 7122(f), an Offer that is not withdrawn, returned, or rejected within twenty-four months of submission would be deemed to be accepted. Stated differently, the Service has up to twenty-four months to evaluate an Offer. I.R.C. § 7122(f) (2006).

and interest on behalf of the government. During that same period, it has granted the Service the discretion to accept Offers from taxpayers of less than the amount owed. Although the wording of section 7122 of the Code would appear to provide the Service with limitless authority to compromise any liability, based on rulings from Attorney General opinions, and on its own initiative, the Service has exercised this authority very restrictively. Moreover, in spite of the Service's periodic efforts to liberalize the Offer policies and procedures (most notably in 1992), the Service has never swayed very far from its commitment to collect the full amount of any outstanding tax liability.

Although, by enacting RRA 1998 Congress encouraged the Service to accept Offers based on financial hardship, equity, and public policy, the Service's stringent and restrictive acceptance standards have made Hardship Offers and Public Policy Offers unattainable for most taxpayers. Yet, rather than enacting legislation that would have required the Service to ease its acceptance standards, Congress chose instead to provide the Service with an invaluable collection tool that made it even more problematic for taxpayers to make viable Offers. Pursuant to TIPRA, an Offer must be accompanied with a non-refundable payment(s) for it to be considered. Therefore, any taxpayer, other than a low-income taxpayer seeking to make an Offer, must make a financial commitment to pre-fund the Offer with no assurance that it will be accepted. So, if recent history is any indication, it is clear that the Offer process was never intended to be an open invitation for a taxpayer to engage in tax gamesmanship with the Service. Accordingly, those who would believe in the hollow promises of the pennies-on-the-dollar pitchmen do so at their own peril.

CONSTITUTIONAL PROTECTIONS
AGAINST THE HARMS TO SUSPECTS IN
CUSTODY STEMMING FROM PERP WALKS

Ryan Hagglund*

INTRODUCTION..... 1758

I. PERP WALKS..... 1764

 A. *History of Perp Walks* 1765

 B. *Execution of Perp Walks by Modern Law Enforcement* 1767

II. THE LAW OF PERP WALKS 1779

 A. *Perp Walks Do Not Violate a Suspect’s Penumbral Right to Privacy* 1781

 B. *Staged Perp Walks But Not Non-staged or Choreographed Perp Walks Are Inconsistent with the Right to Privacy Embodied in the Fourth Amendment* 1784

 1. *The Fourth Amendment Right to Privacy*..... 1785

 2. *A Staged Perp Walk Violates the Fourth Amendment*..... 1793

 3. *A Non-Staged Perp Walk Does Not Violate the Fourth Amendment Although it is Choreographed by Law Enforcement Acting in Conjunction With the Press or Otherwise Involves Law Enforcement Collusion With the Press* 1799

 4. *Perp Walks in the Lower Federal Courts*..... 1814

III. CHOREOGRAPHED PERP WALKS AND RELATED LAW ENFORCEMENT CONDUCT DO NOT COMPORT WITH THE FOURTH AMENDMENT 1819

 A. *The Second Circuit’s Holdings and Reasoning in Lauro and Caldarola are Inconsistent and Cannot*

* Associate, Skadden, Arps, Slate, Meagher & Flom LLP; B.A., Northwestern University, 1999, M.S., 2001, Ph.D., 2003, J.D., 2006, University of Chicago.

<i>Be Reconciled in a Manner Consistent With Supreme Court Precedent.....</i>	1820
<i>B. Choreographed Perp Walks and Related Law Enforcement Conduct to Facilitate the Ability of the Press to Obtain Images of Legitimate Perp Walks Are Unconstitutional Under the Supreme Court's Fourth Amendment Jurisprudence.....</i>	1828
IV. CHOREOGRAPHED PERP WALKS AND RELATED LAW ENFORCEMENT CONDUCT CONSTITUTE UNCONSTITUTIONAL PRETRIAL PUNISHMENT	1854
<i>A. The Supreme Court's Framework for Evaluation of Unconstitutional Preconviction Punishment.....</i>	1856
<i>B. Application of Pretrial Punishment Standards to Staged and Choreographed Perp Walks and Related Cases.....</i>	1868
<i>C. Preconviction Punishment Beyond Choreographed and Staged Perp Walks.....</i>	1896
CONCLUSION.....	1904

INTRODUCTION

When the late Ken Lay, the former chairman of the Enron Corporation, surrendered to authorities on July 8, 2004, after being indicted on a bevy of charges alleging that he deceived Enron's investors and employees in the company's collapse, photographers lined up with cameras blazing to photograph him as he was led in handcuffs by FBI agents into the federal courthouse in Houston, Texas where he pleaded not guilty to the charges.¹ Images of this event appeared on television newscasts and in morning papers nationwide.² This public display, where an accused wrongdoer is led past the waiting cameras of reporters and eyes of the public

¹ See Mary Flood, 'Perp Walks' Raise Debate About the Price of Shame, HOUS. CHRON., July 8, 2004, at A1; Simon Romero, *Satisfaction and Sadness at the Sight of Handcuffs*, N.Y. TIMES, July 9, 2004, at C4.

² See Flood, *supra* note 1.

while in police custody, is known as a perp walk.³ Images of perp walks have been featured in newspapers and newscasts for decades and have become a standard feature of the mainstream media's reporting on crime.⁴ Mr. Lay's ordeal is hardly unique. He is one of the thousands of suspects placed before the media by law enforcement officers.⁵ In fact, perp walks and media depictions of them have become so prevalent that they have been described as an "American institution."⁶ In the wake of corporate scandals involving Enron, Tyco, Worldcom, Adelphia, ImClone, and other corporations, there has been a recent surge in the number of perp walks involving executives accused of white-collar crimes paraded in designer suits and handcuffs.⁷

The prevalence of perp walks and the extent to which they are broadcasted by networks and depicted in newspapers rests, at least in part, upon "their entertainment value."⁸ Law enforcement officers may also facilitate perp walks and the observation of the suspect in custody by the press for punitive purposes. However, perp walks do serve more legitimate purposes, such as informing the public about arrests and law enforcement activities and deterrence of crime.⁹ Nonetheless, perp walks implicate the privacy interests of suspects.¹⁰ The principle harm caused to a suspect who endures a perp walk is the humiliation caused by "walking guilty" or being led into a stationhouse or courthouse by law enforcement officers while in custody in view of the press and the public.¹¹ This spectacle evokes a powerful image of guilt.¹² Such harm manifests itself in two areas: (1) it operates as punishment

³ See, e.g., *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 572 (2d Cir. 2003); Kyle J. Kaiser, Note, *Twenty-First Century Stocks and Pillory: Perp Walks as Pretrial Punishment*, 88 IOWA L. REV. 1205, 1207 (2003); Flood, *supra* note 1.

⁴ See, e.g., *Caldarola*, 343 F.3d at 572; Janine Jackson, "Perp Walks" and Ride-Alongs, EXTRA!, July-Aug. 1999, available at <http://fair.org/extra/9907/perp-walks.html>.

⁵ See Kaiser, *supra* note 3, at 1208-09.

⁶ Frank Cerabino, *Jorandby Failed to Capitalize on His Opportunity as 'Perp Walker'*, PALM BEACH POST, July 13, 2001, at 1B.

⁷ See *Caldarola*, 343 F.3d at 572; Kaiser, *supra* note 3, at 1209.

⁸ See *Caldarola*, 343 F.3d at 572.

⁹ See *id.* at 572-73.

¹⁰ See *id.* at 573.

¹¹ See Kaiser, *supra* note 3, at 1228.

¹² See *Lauro v. Charles*, 219 F.3d 202, 204 (2d Cir. 2000).

by presenting the suspect to the public as guilty and subjecting him to public scorn and ridicule, and (2) it infringes the presumption of innocence and taints the jury pool by showing someone who has merely been accused of a crime as guilty.¹³ Thus, because perp walks occur before any judicial determination that a suspect is guilty of a crime and often before a judicial determination that there is enough evidence to justify a trial, they are a cause for concern as they "shackle [the suspect] with the assumption of guilt."¹⁴

In many cases, perp walks are necessary incidents to arrest and pretrial detention of suspects. Suspects in custody necessarily need to be transported in public places, such as to court appearances in public courthouses or from the place of arrest to police vehicles for transportation to the stationhouse. Sometimes, the media happens to be at the place where a suspect is transported, usually a courthouse or the place where a suspect is arrested, either by happenstance or on the basis of publicly available information.¹⁵ Indeed, police officers cannot lawfully prevent reporters from capturing images of suspects in custody in these situations.¹⁶

However, in other cases, law enforcement officials collude with the press in arranging encounters of suspects being transported while in custody with reporters and photographers. For instance, law enforcement officers and media members may communicate to arrange for the media to most effectively capture images of a suspect while being transported in custody.¹⁷ Such collusion between law enforcement and the press usually takes the form of a law enforcement officer tipping off members of the press as to the time and location of the transportation of the suspect.¹⁸ These situations, in which law enforcement officers collude with the media to facilitate its observation of suspects in custody while they are being transported for legitimate law enforcement purposes, such as to and from court appearances, are known as choreo-

¹³ See Kaiser, *supra* note 3, at 1228.

¹⁴ *Id.* at 1210; see *Lauro*, 219 F.3d at 204.

¹⁵ See Kaiser, *supra* note 3, at 1208.

¹⁶ See *id.* at 1210.

¹⁷ See *infra* notes 67-69 and accompanying text.

¹⁸ See *infra* notes 67-69 and accompanying text.

graphed perp walks.¹⁹ Law enforcement officers have also engaged in similar collaborative or collusive conduct facilitating the ability of the press to capture images of suspects in custody during legitimate transportation of suspects by the exhibition and distribution of a videotape of a perp walk to the press, allowing members of the press not present for a perp walk to observe and obtain images of it.²⁰ In more extreme examples, law enforcement officers will bring a suspect in custody to a public place and parade him before the press although there is no legitimate reason to transport him or strike a suspect so his hands will not cover his face.²¹ A perp walk conducted solely for the purpose of providing the press an opportunity to observe the suspect in custody and involving no legitimate reason for transporting the suspect is referred to as a staged perp walk.²² Choreographed and staged perp walks and related law enforcement conduct shroud suspects in guilt and embarrassment although law enforcement actions that serve solely to facilitate observation of a perp walk by the press are wholly unnecessary and unrelated to the legitimate transportation of a suspect in custody.²³

Despite the needless harm that choreographed and staged perp walks—as well as other related law enforcement conduct associated with perp walks—cause to suspects in custody, both courts and academic commentators alike have given surprisingly little attention to perp walks.²⁴ The Supreme Court has never addressed the propriety of perp walks, and the only court of appeals to do so is the Second Circuit. Relying in part on authority indicating that pretrial detention is considered part of the seizure that occurs when a suspect is arrested to support the proposition that

¹⁹ See, e.g., *Watkins v. City of Highland Park*, 232 F. Supp. 2d 744, 759-60 (E.D. Mich. 2002); *Caldarola v. Cnty. of Westchester*, 142 F. Supp. 2d 431, 440 (S.D.N.Y. 2001), *aff'd*, 343 F.3d 570 (2d Cir. 2003); Hannah Shay Chanoine, Note, *Clarifying the Joint Action Test for Media Actors When Law Enforcement Violates the Fourth Amendment*, 104 COLUM. L. REV. 1356, 1367-68, 1375-76 (2004); Kaiser, *supra* note 3, at 1212, 1223-24; *cf.* *Caldarola*, 343 F.3d at 576-77.

²⁰ See, e.g., *Caldarola*, 343 F.3d at 572.

²¹ See, e.g., Kaiser, *supra* note 3, at 1208.

²² See, e.g., *Lauro v. Charles*, 219 F.3d 202, 203-04, 213 (2d Cir. 2000).

²³ See Kaiser, *supra* note 3, at 1211.

²⁴ See, e.g., John Tierney, *Walking the Walk*, N.Y. TIMES, Oct. 30, 1994, § 6 (Magazine), at 30.

Fourth Amendment protections apply to those lawfully in police custody, the Second Circuit analyzed perp walks in light of the Fourth Amendment right to privacy against unreasonable searches and seizures.²⁵ The Second Circuit held that a staged perp walk conducted solely for the benefit of the press and advancing no specific law enforcement objectives is unreasonable and thus violates the suspect's Fourth Amendment privacy rights.²⁶ However, the Second Circuit also determined that perp walks conducted in connection with legitimate transportation of a suspect in custody, including such perp walks conducted in a manner that facilitates and exacerbates exposure of the suspect to the media, are constitutional.²⁷ Thus, the Second Circuit's approach permits choreographed perp walks.²⁸ This approach has generally been employed by the lower federal courts both inside and outside the Second Circuit,²⁹ and is referred to as the perp walk doctrine.³⁰

While the perp walk doctrine provides suspects with some protection of their privacy interests against unnecessary humiliation by perp walks, this protection is woefully inadequate. The perp walk doctrine permits choreographed perp walks although collusion between law enforcement officers and reporters to facilitate the media's observation of the legitimate transportation of a

²⁵ See *Lauro*, 219 F.3d at 212 (citing *Albright v. Oliver*, 510 U.S. 266, 277-79 (1994) (Ginsburg, J., concurring)). Issues regarding temporal scope of the Fourth Amendment and a seizure for its purposes vis-a-vis pretrial detention are discussed in Part IV.B, *infra*.

²⁶ See *Lauro*, 219 F.3d at 213; see also *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 576 (2d Cir. 2003) (following *Lauro*).

²⁷ See *Caldarola*, 343 F.3d at 576-77.

²⁸ See *id.*; Kaiser, *supra* note 3, at 1212, 1223-24.

²⁹ See *Gibbons v. Lambert*, 358 F. Supp. 2d 1048, 1071-73 (D. Utah 2005); *Watkins v. City of Highland Park*, 232 F. Supp. 2d 744, 757-61 (E.D. Mich. 2002); *Otero v. Town of Southampton*, 194 F. Supp. 2d 167, 181 (E.D.N.Y. 2002); *Camiolo v. State Farm Fire & Cas. Co.*, No. 00-3696, 2002 U.S. Dist. LEXIS 25708, at *25-26 (E.D. Pa. Feb. 1, 2002); see also *United States v. Fastow*, 292 F. Supp. 2d 914, 918-19 (S.D. Tex. 2003) (upholding a perp walk that would be constitutional under the Second Circuit's approach with little explanation); *United States v. McVeigh*, 118 F. Supp. 2d 1137, 1154 (D. Colo. 2000) (employing logic similar to that of Second Circuit); cf. *OPW Fueling Components v. Works*, No. 1:06cv187, 2007 U.S. Dist. LEXIS 34083, at *34-41 (S.D. Ohio May 9, 2007) (applying this approach to determine the constitutionality of the arrest of a suspect at work and the attendant transportation of him in custody in front of his coworkers).

³⁰ See Kaiser, *supra* note 3, at 1211.

suspect in custody has nothing to do with the objectives of that transportation. Choreographed perp walks are much more common than staged perp walks.³¹ Therefore, the perp walk doctrine forecloses unnecessary humiliation caused by perp walks to a very limited degree.

This Article proceeds in four parts. Part I describes the role of perp walks in the American criminal justice system and the inequities and harms they cause for individuals suspected of committing a crime. Part II outlines the Second Circuit's perp walk doctrine and its development. Part III analyzes the perp walk doctrine in light of the Supreme Court's Fourth Amendment jurisprudence and concludes that the Second Circuit construed the Fourth Amendment too narrowly in fashioning the perp walk doctrine. The Supreme Court requires that law enforcement officers carry out seizures, including pretrial detentions and attendant transportations of suspects in custody, in a manner related to the legitimate purposes of the seizure. Collusion between law enforcement officers and the press to facilitate the press's ability to capture images of the suspect in custody is not reasonably related to a legitimate transportation of a suspect in custody, such as bringing the suspect to a court appearance, or the legitimate objectives of a lawful arrest or seizure of a suspect. Thus, the Second Circuit erred in concluding that law enforcement conduct in collaboration with the press to facilitate the press's ability to capture images of the legitimate transportation of a suspect in custody in a context related to a choreographed perp walk, the making of a videotape of a perp walk and the exhibition and dissemination of it to the press by law enforcement, comported with the Fourth Amendment. Finally, Part IV examines perp walks in the light of the prohibition of preconviction punishment found by the Supreme Court under the Due Process Clauses of the Fifth and Fourteenth Amendments. Part IV concludes that choreographed and staged perp walks, as well as other acts of collusion by law enforcement with the press to facilitate the capture of images of a perp walk and any police actions in effecting the transportation of a suspect in custody expressly intended to punish, shame, or humiliate the

³¹ See *Lauro*, 219 F.3d at 213.

suspect, for instance by facilitating the observation of him by the press, may constitute unconstitutional pretrial punishment, at least under certain circumstances.

I. PERP WALKS

The perp walk, as it is popularly known, is a widespread police practice in which the suspected perpetrator of a crime, after being arrested, is displayed or walked in front of the public and news media, usually while wearing handcuffs, giving members of the media present the opportunity to photograph or videotape him.³² The Second Circuit has articulated a broader definition of perp walk, using the term to describe “when an accused wrongdoer is lead away in handcuffs by the police to the courthouse, police station, or jail” without specifically requiring the presence of the media (although such a definition surely includes viewing by the media).³³ In perp walks, the police expose unconvicted, and sometimes uncharged, suspects to the media.³⁴ The perp walk both publicizes the police’s crime-fighting efforts and provides the press with a dramatic illustration to accompany stories about the crime.³⁵ This spectacle humiliates the suspect and is a “powerful image of guilt.”³⁶

This Part describes the role of perp walks in modern law enforcement. First, it describes the history of perp walks. Second, this Part explores the execution of perp walks by modern law enforcement, revealing the collusion between media actors and law enforcement officials, and discusses the rationales employed by law enforcement to justify perp walks and the effects perp walks have on suspects and society as a whole. In these discussions, this Part concludes that law enforcement agencies and prosecutors engage in untoward conduct in arranging perp walks with the media and in determining whether a perp walk should take place

³² See, e.g., Jim Ruiz & D.F. Treadwell, *The Perp Walk: Due Process v. Freedom of the Press*, 21 CRIM. JUST. ETHICS 44, 44 (2002).

³³ *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 572 (2d Cir. 2003).

³⁴ See Kaiser, *supra* note 3, at 1207.

³⁵ See Ruiz & Treadwell, *supra* note 32, at 44.

³⁶ *Lauro*, 219 F.3d at 204; see Editorial, *A Public Shaming*, ST. LOUIS POST-DISPATCH, Oct. 5, 2002, at 30; Kaiser, *supra* note 3, at 1208-11.

and the character of such a perp walk in individual cases. This Part also suggests that perp walks humiliate suspects and erode the presumption of innocence.

A. History of Perp Walks

The practice of parading prisoners before the public is an ancient one.³⁷ Perhaps the most famous instance occurred during the Passion of Christ along the Via Dolorosa in Jerusalem about 2000 years ago.³⁸ While Jesus had already been condemned when this spectacle occurred, “[c]onviction has never been a prerequisite for public exposure” of a suspected criminal.³⁹ During the Spanish Inquisition, authorities led suspected heretics past a reviewing stand on their way to interrogation.⁴⁰

The modern practice of walking suspects past the media began in the late nineteenth century when law enforcement authorities realized that “parading a criminal before a cameraman’s lens is a way of achieving public support for policing programs.”⁴¹

³⁷ Douglas Kalajian, *A Historical Walking Tour of Arrests from Oswald to Brazill*, PALM BEACH POST, Nov. 13, 2002, at 5D.

³⁸ See *id.* Likewise, during the French Revolution, condemned aristocrats, including Queen Marie Antoinette, were transported while bound through the streets of Paris in open-aired tumbrels to the guillotine. The trip was often a slow one, lasting an hour or more, and the condemned were forced to endure jeers, boos, and even being spit upon by onlookers.

³⁹ *Id.*

⁴⁰ See *id.*

⁴¹ Andrew Martin, *Facing the Music: Ritual of the Accused’s ‘Perp Walk’ Feeds the Public Thirst for Justice*, CHI. TRIB., July 14, 1997, at C1. There is some dispute as to the origin of the term “perp walk” in describing the display of a suspect in police custody to the media. The term has been reputedly used since at least the 1940s by New York police and photographers. See Tierney, *supra* note 24. However, some reporters reporting on police movements of suspects in custody in the 1950s deny that the term was used at that time. See Kalajian, *supra* note 37. Robert Morgenthau, the Manhattan district attorney, has said that the term was first used in the 1970s. See William Safire, *The Way We Live Now*, N.Y. TIMES, Sept. 15, 2002, § 6 (Magazine), at 30. Despite these disputes, there is general agreement that the term entered the popular vocabulary in the 1980s after being popularized by writers such as Tom Wolfe. See Kalajian, *supra* note 37. Indeed, the term was first used in print by a major news organization in 1986. See Safire, *supra*. Whatever its origins may be, the term “perp walk” has infiltrated the American lexicon to such an extent that it now has a dictionary definition. See, e.g., AMERICAN HERITAGE COLLEGE DICTIONARY 1038 (4th ed. 2002) (defining “perp walk” as “[t]he deliberate escorting of an arrested suspect by police in front of the news media, especially as a means of pressuring or humiliating the suspect”).

However, prior to the advent of television, perp walks were not as common as they are today.⁴² Police routinely invited reporters to the stationhouse and allowed them to photograph suspects in their cells or elsewhere inside the stationhouse.⁴³ This practice rarely occurs anymore, in part because of changed relations between the police and the press stemming from press investigations of police tactics.⁴⁴ However, the press and law enforcement still share a symbiotic relationship, and perp walks have “emerged [due] to th[is] changed social reality.”⁴⁵

Many notable arrestees have been subjected to perp walks including President Kennedy’s assassin Lee Harvey Oswald, domestic terrorist Timothy McVeigh, and comedienne Paula Poundstone, but these are only a few of the thousands of arrestees placed before the media by the police each year.⁴⁶ However, only since the 1980s have white-collar defendants been subjected to perp walks.⁴⁷ Previously, perp walks were generally reserved for serial killers, heinous rapists, mafia leaders, celebrity defendants, and other notorious felons.⁴⁸ The first major white-collar perp walk occurred in 1987, when, at the direction of federal prosecutor Rudolph Giuliani, three brokers, Richard Wigton, Robert Freeman, and Timothy Tabor, were arrested at Kidder-Peabody, handcuffed, and paraded down Wall Street “in an explosion of camera lights.”⁴⁹ This perp walk proved controversial as all charges were dismissed against two of the three suspects.⁵⁰ Recently, there has been a surge of perp walks involving alleged white-collar criminals.⁵¹ White-collar suspects subjected to perp walks include Ken Lay, Andrew Fastow, and Lea Fastow of Enron; John Rigas of

⁴² See Ruiz & Treadwell, *supra* note 32, at 46.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ *Id.*

⁴⁶ See Kaiser, *supra* note 3, at 1208-09.

⁴⁷ See Richard Reeves, *Government by Pin-striped Perp Walk*, TULSA WORLD, Aug. 7, 2002, at A15.

⁴⁸ See *A Public Shaming*, *supra* note 36.

⁴⁹ Reeves, *supra* note 47; see JAMES B. STEWART, DEN OF THIEVES 379-86 (1992).

⁵⁰ See Reeves, *supra* note 47; STEWART, *supra* note 49, at 398-99.

⁵¹ See, e.g., *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 572 (2d Cir. 2003).

Adelphia; Dennis Kozlowski of Tyco; and Bernard Ebbers of WorldCom.⁵²

B. Execution of Perp Walks by Modern Law Enforcement

Although the perp walk is a common phenomenon, captured practically daily in the newspapers of large cities and routinely depicted on news broadcasts, it is a grotesque spectacle.⁵³ Some reporters describe the perp walk as a ritual, replete with its own etiquette and traditions.⁵⁴ Indeed, New York Times reporter John Tierney describes a perp walk as a “helplessly handcuffed . . . [suspect being] dragged though a horde of screaming reporters and jostling photographers.”⁵⁵ Tierney explains that those who observe a perp walk “assume [they are] seeing a barbaric mob wreaking random havoc” but that, in reality, a perp walk is “a barbaric mob wreaking exquisitely planned havoc.”⁵⁶ While all perp walks do not have the mob-like character that Tierney describes, it is undeniable that any perp walk where the media captures images of a handcuffed suspect creates a spectacle that is humiliating for the suspect.⁵⁷

Perp walks are a natural outgrowth of the symbiotic relationship between law enforcement and the media.⁵⁸ Accordingly, the police often assist the media’s efforts to obtain images of a suspect in custody. In the vast majority of cases, the media is present either at the place where an arrest takes place or at a courthouse or police station when a suspect is transferred in custody.⁵⁹ Often, the media happens to be at the place the suspect is moved.⁶⁰ How-

⁵² See, e.g., *United States v. Fastow*, 292 F. Supp. 2d 914, 918-19 (S.D. Tex. 2003); John Schwartz, *Never Mind Justice. How About Just Deserts?*, N.Y. TIMES, Apr. 10, 2005, § 3 (Sunday Business), at 26; *A Public Shaming*, *supra* note 36.

⁵³ See Tierney, *supra* note 24.

⁵⁴ See *id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See, e.g., Flood, *supra* note 1; see also James Q. Whitman, *Making Happy Punishers*, 118 HARV. L. REV. 2698, 2699 (2005) (reviewing MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2004)) (noting the humiliating nature of perp walks).

⁵⁸ See Ruiz & Treadwell, *supra* note 32, at 46.

⁵⁹ See Kaiser, *supra* note 3, at 1208.

⁶⁰ See *id.*

ever, the police and media frequently communicate to coordinate the movement of a suspect in custody with the press's presence at the place where the movement will occur in order to ensure that the media actually captures images of the accused.⁶¹ In other cases, the police may exhibit or distribute copies of a videotape of a suspect being transported in custody to members of the media who are not present for the event.⁶² In the most egregious instances, the police will stage a perp walk, moving a suspect for a short distance and returning him to the place where he is being held, for no reason other than the creation of an opportunity for the press to observe the suspect being moved while in custody.⁶³ Police have done this when a photographer arrived late and missed the real movement or when news deadlines are looming and there is a delay in a legitimate transfer.⁶⁴ Another egregious manner in which the police facilitate the observation of the suspect is the use of physical force to compel the suspect to appear before the media and allow the media to capture his image. Chicago police officers escorting a suspect have been reported to punch him in the stomach if he attempted to conceal his face from the press by covering it with his hands causing the suspect to drop his hands and reveal his face to the cameras.⁶⁵ In a rather notorious incident in 1962, at the request of a frustrated photographer who was unable to photograph a suspect who was putting his head down, a New York police officer forcibly lifted the suspect's head allowing the photographer to photograph the suspect's face.⁶⁶ However, most instances of choreography of perp walks between law enforcement and the press are less extreme. The contemporary standard for choreographed perp walks is for the police to send advisories to news

⁶¹ See, e.g., *id.*

⁶² See *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 572 (2d Cir. 2003).

⁶³ See *Lauro v. Charles*, 219 F.3d 202, 204-05 (2d Cir. 2000); Kaiser, *supra* note 3, at 1208. Such staged perp walks have been held unconstitutional. See *Lauro*, 219 F.3d at 206-14; see also *infra* Part II.B.

⁶⁴ See Kaiser, *supra* note 3, at 1208; Tierney, *supra* note 24; see also Reeves, *supra* note 47.

⁶⁵ See Tom McNamee, *Cop-Abuse Cases Must Fight Public Perceptions*, CHI. SUN-TIMES, Oct. 12, 1997, at 11.

⁶⁶ See Blaine Harden, *Parading of Suspects Is Evolving Tradition*, N.Y. TIMES, Feb. 27, 1999, at B1. The officer was reported to have "stretch[ed] the suspect's face as if it were pizza dough." *Id.* The officer was reprimanded for the incident. See *id.*

organizations about opportunities to photograph suspects in cases they think will attract interest.⁶⁷ Police officers tip reporters off as to when and where suspects will be moved, ensuring that the reporters will be in position to photograph or film the suspect as he is transported.⁶⁸ This manner of arranging perp walks works very effectively. Indeed, one veteran reporter described the coordination of perp walks by the media and police “to be almost a science.”⁶⁹

However, law enforcement agencies are often less than forthright about their coordination of perp walks with the press. Despite the fact that their officers choreograph perp walks by colluding with the press, many law enforcement agencies officially “neither encourage[] nor discourage[]” perp walks.⁷⁰ Indeed, one commentator noted that “[a]sking [law enforcement agencies or prosecutors] . . . about perp walks is like asking the Air Force about UFOs[—o]fficially, they don’t exist, no matter what millions of people have seen.”⁷¹ Unofficially, however, police officers facilitate perp walks and collaborate with the press to ensure that the press is aware when and where suspects will be moved as described above. Law enforcement officers and prosecutors appear to exercise a great deal of discretion when deciding whether a given suspect should be taken on a perp walk and what that perp walk will entail. Indeed, *New York Times* reporter John Tierney notes that whether a perp walk will occur “depends on the [individual police officers involved], the crime, and the [suspect].”⁷² The police may

⁶⁷ See Ruiz & Treadwell, *supra* note 32, at 53 n.35.

⁶⁸ See Reeves, *supra* note 47; see also Thomas F. Liotti & Christopher Zeh, *The Uneven Playing Field: Ethical Disparities Between the Prosecution and Defense Functions in Criminal Cases*, 17 *TOURO L. REV.* 467, 494 (2001) (“The press is alerted to the fact that the defendant will be available for a photo opportunity as he or she is led from the stationhouse to the courthouse for arraignment.”); Randy Kennedy, *50 Years of Perps, With Speed and Flash*, *N.Y. TIMES*, Mar. 4, 1999, at B2 (quoting a long-time Associated Press photographer as saying that police officers would notify the press that a suspect in custody would be moved by telling them that “[the suspect will] be out in 10 minutes” giving the photographers the opportunity to line up to photograph the suspect when he emerged).

⁶⁹ See Ruiz & Treadwell, *supra* note 32, at 53 n.35 (quoting *New York Post* reporter Mike Pearl).

⁷⁰ Tierney, *supra* note 24; see Martin, *supra* note 41.

⁷¹ Kalajian, *supra* note 37.

⁷² Tierney, *supra* note 24.

fail to inform the press about the movements of suspects who are favored by the police, such as corrupt police officers and informants, and may transport them in ways where they are less visible to the press, such as through a side door, or may provide them with a protective hat or hood.⁷³ On the other hand, if police or prosecutors are especially proud of the arrest of a particular suspect, he may be transported in public view by a longer route than is necessary so the press may have a greater opportunity to capture his image.⁷⁴ Reporters and police refer to this extended perp walk as a perp parade.⁷⁵ Thus, the police appear to make decisions concerning perp walks for illegitimate reasons as suspects who have a relationship with the police are afforded more privacy. Indeed, some argue that perp walks mainly serve as an opportunity for police officers to appear on television.⁷⁶

The untoward handling of perp walks is not confined to the stationhouse. Rather, it extends to the prosecutor's office on both the state and federal level.⁷⁷ Prosecutors contend that their reasons for publicly arresting John Rigas, a seventy-eight year old white-collar suspect, in public resulting in a perp walk where he was paraded before photographers and television cameras in handcuffs rather than permitting him to surrender privately turned on legitimate factors including "the potential risk of flight, possible danger to the public, and the nature of the offense."⁷⁸ However, the prosecutors' conclusion to conduct a public arrest and perp walk of a seventy-eight year old suspect charged with a non-violent, white-collar crime based on the factors they articulated is specious at best. Indeed, a respected former U.S. attorney

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See Chanoine, *supra* note 19, at 1369 ("Some argue that rather than serving purportedly noble law enforcement objectives, the practice [of perp walks] mainly gives police officers a chance to get on television.").

⁷⁷ One commentator has argued that the rules of legal ethics prohibit prosecutors from playing a role in the arrangement of perp walks and require prosecutors to take reasonable care to prevent police officers and other law enforcement personnel associated with a criminal case from conducting perp walks. See Ernest F. Lidge III, *Perp Walks and Prosecutorial Ethics*, 7 NEV. L.J. 55 (2006).

⁷⁸ Benjamin Weiser, *Same Walk, Nicer Shoes; Parading of Executives in Custody Fuels New Debate*, N.Y. TIMES, Nov. 26, 2002, at B1.

indicated that the government intentionally conducts perp walks for suspects accused of white-collar crimes to send a strong message that the government is serious and acting vigorously in the white-collar crime area, to deter other corporate executives from committing white-collar offenses, and to restore investor confidence.⁷⁹ Moreover, prosecutors often decide to subject a suspect, white-collar or otherwise, to a perp walk for illegitimate reasons. Generally, images of a perp walk where a handcuffed defendant is surrounded by stern-looking law enforcement officers serve to gnaw away at the presumption of innocence, perhaps the most fundamental precept of the American judicial system.⁸⁰ However, when there is a reservoir of public sympathy for a suspect, prosecutors tend to avoid perp walks and permit a suspect to surrender privately because a perp walk could be counterproductive to the government's objectives because it may heighten sympathy for the suspect.⁸¹ This distinction explains why the government did not subject Martha Stewart to a perp walk and allowed her to surrender privately while white-collar offenders who were her contemporaries including Sam Waksal, a player in the same case as Stewart, and Lea Fastow, an Enron executive, were indicted and hauled into court in handcuffs.⁸² In contrast to Ms. Stewart, the latter suspects were generally despised as wealthy white-collar criminals and did not arouse public sympathy.⁸³ The government is wrong to selectively choose those paraded in a highly inflammatory perp walk on the basis of whether the perp walk will benefit the government's position in the court of public opinion and thus with prospective jurors.⁸⁴ Another illegitimate manner in which prosecutors use perp walks is to punish suspects who elect to exercise their constitutional right to go to trial and refuse to cooperate with prosecutors.⁸⁵ Moreover, just as individuals having a re-

⁷⁹ See Jonathan D. Glater, *Those Very Public Arrests of Executives*, N.Y. TIMES, July 28, 2002, § 3 (Money and Business/Financial Desk), at 4.

⁸⁰ See Stephen W. Grafman, *End an Ignoble Spectacle*, NAT'L L.J., Aug. 11, 2003, at 31.

⁸¹ See *id.*

⁸² See *id.*

⁸³ See *id.*; *A Public Shaming*, *supra* note 36; Weiser, *supra* note 78.

⁸⁴ See Grafman, *supra* note 80.

⁸⁵ See Flood, *supra* note 1.

lationship with the police may receive more favorable treatment with respect to perp walks,⁸⁶ complaints have arisen that perp walks have become a tool of “crony-ism” used by prosecutors where politically connected individuals are offered an opportunity to turn themselves in outside of the glaring eye of cameras and lights while those who are not connected are subjected to a perp walk while in restraints.⁸⁷ Finally, some observers view perp walks as a vehicle by which aggressive prosecutors exploit and humiliate suspects who have not been convicted to enhance their own publicity and personal careers.⁸⁸

However, the government may employ perp walks for other, more legitimate reasons than to manipulate public opinion against an accused. Perp walks serve the serious purpose of educating the public about law enforcement efforts.⁸⁹ A perp walk does permit the public to observe a facet of the manner in which law enforcement administers justice on the public’s behalf.⁹⁰ The image of a restrained suspect in custody, being led away to contend with the justice system, “powerfully communicates government efforts to thwart the criminal element, and it may deter others from attempting similar crimes.”⁹¹ Indeed, one commentator has noted that “[t]he bold image of a bound defendant may scare others

⁸⁶ See *supra* notes 72-73 and accompanying text.

⁸⁷ Chanoine, *supra* note 19, at 1370 (quoting Maro Robbins, *Some Call ‘Perp Walk’ an Inconsistent Ritual: Councilmen Were Paraded in Cuffs, but not Ex-AG*, SAN ANTONIO EXPRESS-NEWS, Mar. 17, 2003, at 1A). For instance, in late 2002, two San Antonio city councilmen were arrested and charged with bribery and subjected to a perp walk past a gauntlet of media and television cameras in handcuffs by the FBI. See Robbins, *supra*. In comparison, a former Texas attorney general arrested six months later by the same FBI and U.S. Attorney’s office on fraud and tax evasion charges was allowed to turn himself in and was not subjected to a perp walk. *Id.* A San Antonio newspaper noted that the disparity in treatment between the two cases was recognized by some members of the San Antonio legal and even law enforcement communities. See *id.* For instance, prosecutors did not argue that any of the defendants were a flight risk and none of the defendants seemed significantly more likely to lash out physically than the others. See *id.* The councilmen alleged that the former attorney general’s “stature as a former statewide elected official saved him from handcuffs and cameras.” *Id.*

⁸⁸ See Chanoine, *supra* note 19, at 1369 (“Many see the perp walk as an abusive exploitation serving publicity-hungry prosecutors eager to enhance their personal careers.”).

⁸⁹ See *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 572 (2d Cir. 2003).

⁹⁰ Chanoine, *supra* note 19, at 1369.

⁹¹ *Caldarola*, 343 F.3d at 572-73.

straight.”⁹² For instance, in the white-collar context, perp walks may deter fraudulent behavior among executives.⁹³ Also, perp walks help law enforcement garner public support for policing programs.⁹⁴ In certain cases, especially rape and burglary cases, perp walks serve important specific law enforcement purposes. In these cases, showing images of the suspect’s face in the press “can sometimes unearth new witnesses or victims.”⁹⁵ Likewise, perp walks serve the purpose of demonstrating to the public that law enforcement officials believe that the danger to the community posed by the accused has been removed.⁹⁶ This purpose is especially justified where an individual accused of a notorious violent crime or series of crimes is apprehended after a public manhunt inasmuch as a perp walk serves to abate public fear of the particular suspect. In addition, perp walks may encourage guilty pleas and cooperation with current investigations.⁹⁷

Furthermore, perp walks also may provide some protections to the accused. Coverage of a perp walk by the media informs a suspect’s friends and supporters that he is under arrest, perhaps falsely.⁹⁸ Thus, perp walks give the suspect some protection against improper arrest and detention, as the government could not arrest a citizen and deny it was holding him if challenged.⁹⁹ Likewise, perp walks may insulate suspects from some forms of police brutality or abuse, such as beatings by police or jail personnel, inasmuch as images of the suspect, including his or her face in most cases, are captured by the press and disseminated to the public as a result of a perp walk.¹⁰⁰ Thus, perp walks inform the

⁹² Robbins, *supra* note 87.

⁹³ Chanoine, *supra* note 19, at 1368.

⁹⁴ See Martin, *supra* note 41.

⁹⁵ *Id.*; see also Chanoine, *supra* note 19, at 1368 (“Media exposure of the arrestee’s image may encourage unknown witnesses to step forward with information.”).

⁹⁶ See Stephen A. Saltzburg, *The Fourth Amendment: Internal Revenue Code or Body of Principles?*, 74 GEO. WASH. L. REV. 956, 1003-04 (2006).

⁹⁷ See Chanoine, *supra* note 19, at 1368.

⁹⁸ See Editorial, *Keep the Perps Walking*, N.Y. POST, Feb. 27, 1999, at 14.

⁹⁹ See *id.*

¹⁰⁰ See, e.g., Chanoine, *supra* note 19, at 1369 (“[A] perp walk provides images of an arrested suspect’s physical condition, leading some observers to believe that police are less likely to beat a suspect who will be exposed to the media.”); Robbins, *supra* note 87 (“[S]uspects are less likely to be beaten during an arrest if their photo is to be taken.”).

public about certain injuries to a suspect in custody, such as injuries to the face or debilitating injuries noticeably affecting a suspect's ability to walk or stand. In this way, perp walks inform the public, including a suspect's friends and family, about his physical condition while in custody, as well as document it.¹⁰¹ Given the legal consequences and public opprobrium associated with the physical abuse of suspects in custody, the public viewing of a suspect, inherent in a perp walk, discourages law enforcement officers from causing injuries to suspects that can be viewed by the public and captured on film during the perp walk. Indeed, a perp walk is a vehicle in which a suspect's friends and family can observe his condition in custody and contact the suspect's attorney or pursue other legal avenues if they observe that the suspect has been harmed while in custody.

Nonetheless, it is unquestionable that the media's strong desire to capture images of perp walks stems at least in part from their entertainment value.¹⁰² Perp walks "serve[] a public desire for titillation."¹⁰³ Society abhors criminals.¹⁰⁴ When the public observes a suspect in custody and restrained, "it indicates that the [criminal justice] system is working, and that the [accused criminal] will get his just desserts."¹⁰⁵ Thus, the perp walk is a ritual that serves to reaffirm public faith in the criminal justice system.¹⁰⁶ In this way, perp walks can deflect political heat from law enforcement, prosecutors, and higher executive branch officials.¹⁰⁷ Some commentators have suggested that in the white-collar crime

¹⁰¹ For example, the Dallas police intended for the press to photograph the transfer of Lee Harvey Oswald to permit the public to observe his physical condition and see that law enforcement officers had not abused him while in custody. See Nicholas E. Poser, *Lauro v. Charles: Perp Walk Decision Leaves Troubling Questions*, COMM. L., Summer 2001, at 3, 7. "[T]he police purportedly wanted the media to see [that they] haven't abused and mistreated him in any way, and the only way to do that is to let them view the transfer." *Id.* at 7 n.41 (internal quotation marks omitted). One commentator has suggested that "[p]hotographs of Dr. Martin Luther King, Jr., while in the custody of Birmingham authorities may have reassured the public about his treatment in jail." *Id.* at 7.

¹⁰² See *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 572 (2d Cir. 2003).

¹⁰³ Martin, *supra* note 41 (quoting criminologist Robert McCrie).

¹⁰⁴ See *id.*

¹⁰⁵ *Id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *A Public Shaming*, *supra* note 36.

context, government officials exploit this characteristic of perp walks to focus public attention on scapegoats and divert it from the larger problems of corporate corruption and the government's failure to abate them.¹⁰⁸ Furthermore, in the white-collar crime context, perp walks serve the public's desire to see "rich crooks get their comeuppance," and the public derives satisfaction in observing wealthy suspects accused of white-collar crimes, who may have caused harm to large numbers of ordinary citizens, handcuffed and in custody.¹⁰⁹

Although the police and media claim that perp walks inform the public, expose corruption, and right wrongs, the targets of the perp walk, who in many cases have not been formally charged, are "publicly embarrassed and immediately shackled with the assumption of guilt," even though they are clothed with the presumption of innocence in the American justice system.¹¹⁰ Many suspects appear unshaven or disheveled during their perp walk, as they may have been subjected to hours of questioning and/or spent a night in jail.¹¹¹ This is "hardly a portrayal that enhances their presumption of innocence."¹¹² Thus, the Second Circuit has acknowledged that "[a]lthough a perp walk commonly occurs before any judicial determination that a suspect has actually committed the crime for which he was arrested, or even that there is enough evidence to justify a trial, a suspect in handcuffs being led into a stationhouse is a powerful image of guilt."¹¹³ Indeed, viewing a perp walk can prejudice potential jurors and witnesses against a suspect.¹¹⁴ The Supreme Court has long considered the presumption of innocence a bedrock principle of criminal law.¹¹⁵ As perp walks ascribe images of guilt to individuals who have not

¹⁰⁸ See, e.g., Kaiser, *supra* note 3, at 1209; Reeves, *supra* note 47.

¹⁰⁹ See, e.g., Romero, *supra* note 1; *A Public Shaming*, *supra* note 36.

¹¹⁰ Kaiser, *supra* note 3, at 1210.

¹¹¹ See Liotti & Zeh, *supra* note 68, at 494.

¹¹² *Id.*

¹¹³ *Lauro v. Charles*, 219 F.3d 202, 204 (2d Cir. 2000).

¹¹⁴ See Martin, *supra* note 41.

¹¹⁵ See *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of . . . our criminal law.").

been proven guilty, they erode this fundamental principle of the presumption of innocence.¹¹⁶

Furthermore, even the term "perp walk" connotes the guilt of the suspect subjected to it. The term "perp" is a clip of "perpetrator."¹¹⁷ The word's origin is in the Latin *perpetrare*, which means "to execute . . . [or] bring about."¹¹⁸ In English, the term "perpetrator" is almost always used to refer to an individual who committed an evil deed or crime.¹¹⁹ While careful reporters and law enforcement officials only use the term perpetrator to describe an individual convicted of a crime, police routinely employ the term to mean "the one we caught," including uncharged and unconvicted suspects, in their everyday vernacular.¹²⁰

In a related vein, some defense attorneys consider perp walks "an unethical attempt by police to skirt the Fifth Amendment's protection against self-incrimination."¹²¹ The rationale is that the conditions of a perp walk, replete with its physical humiliation and the onslaught of camera crews and reporters, are conducive to triggering excited utterances, which qualify for an exception to the hearsay rule and are accordingly admissible in court, by the suspect in custody.¹²²

In addition to eroding the presumption of innocence and placing a suspect in a position where he is more likely to incriminate himself, perp walks also publicly humiliate a suspect and are intended to do so by law enforcement and the media.¹²³ Indeed, perp walks are often compared to shaming punishments used in colonial times, such as the stocks, pillory, and requiring an adulteress to wear a scarlet letter "A," and to punishments employed by "exper-

¹¹⁶ See Grafman, *supra* note 80.

¹¹⁷ Safire, *supra* note 41.

¹¹⁸ *Id.*

¹¹⁹ *See id.*

¹²⁰ *See id.*

¹²¹ Chanoine, *supra* note 19, at 1369 (citing Liotti & Zeh, *supra* note 68, at 495).

¹²² See Chanoine, *supra* note 19, at 1369; Liotti & Zeh, *supra* note 68, at 495.

¹²³ See, e.g., *A Public Shaming*, *supra* note 36; Martin, *supra* note 41; *Keep the Perps Walking*, *supra* note 98; see also Saltzburg, *supra* note 96, at 1004. Indeed, dictionary definitions of the term "perp walk" recognize that the purpose of a perp walk is often to humiliate. See, e.g., AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 41, at 1038 (defining "perp walk" as "[t]he deliberate escorting of an arrested suspect by police in front of the news media, esp. as a means of pressuring or humiliating the suspect").

imental” judges who use shame punishments in lieu of incarceration for offenders, especially juveniles, who might be shamed into rehabilitation.¹²⁴ The effects of these punishments, like those of perp walks, are “less physical than psychological . . . [—t]he victim [is] held up to public ridicule.”¹²⁵ The purposes for shaming punishments in colonial times were analogous to the purposes advanced for perp walks—satisfying the public’s desire to see criminals get their just desserts, deterring future offenders, and demonstrating the effectiveness of law enforcement to the public.¹²⁶ However, beside the methods employed, there is a seminal difference between perp walks and colonial shaming.¹²⁷ In colonial times, only convicted criminals were shamed.¹²⁸ Perp walks “shame those who are only accused, and supposedly presumed innocent.”¹²⁹

Anthropologist David Kertzer describes a perp walk as “a ritual degradation that publicly signals [a person’s] change in status from an ordinary citizen” to a suspected criminal.¹³⁰ He equates a perp walk with “ripping the stripes off the shoulders of a military officer.”¹³¹ Military courts consider this act humiliating and hold that removal of insignia from an accused’s uniform and marching him in front of other soldiers constitutes improper pretrial punishment.¹³² This reasoning further supports the notion that perp walks humiliate and shame the accused. While displaying a handcuffed defendant in a perp walk degrades him, “[t]he police presence during the walk reinforces [society’s] desire for moral boundaries to be enforced.”¹³³ The perp walk ritual evokes strong emotions associated with the notion that the suspect “has sinned

¹²⁴ See Kaiser, *supra* note 3, at 1209-10; *A Public Shaming*, *supra* note 36.

¹²⁵ *A Public Shaming*, *supra* note 36.

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See Kaiser, *supra* note 3, at 1209; *A Public Shaming*, *supra* note 36.

¹²⁹ *A Public Shaming*, *supra* note 36.

¹³⁰ John Tierney, *Even Perps May Prefer Walk of Fame*, N.Y. TIMES, Mar. 1, 1999, at B1 (quoting anthropologist David Kertzer).

¹³¹ *Id.*

¹³² See *United States v. Cruz*, 25 M.J. 326, 330-31 (C.M.A. 1987) (finding a violation of military law banning pretrial punishment but not addressing the constitutional right against pretrial punishment).

¹³³ Tierney, *supra* note 130 (quoting anthropologist David Kertzer).

against the community.”¹³⁴ However, “[society is] also afraid of police power run amok, so [it] expect[s] the police to act decorously, and [it is reassured] to see the perp’s rights being protected by other social institutions, like the courthouse where [the suspect in a perp walk is] being taken.”¹³⁵ Thus, “[a] ritual like the perp walk eases social anxieties about [an unconvicted suspect in a criminal case,] someone whose status is unclear”¹³⁶ Although perp walks humiliate a suspect and label him as guilty, they “symbolically reconcile[] people’s contradictory feelings about the perp: while they think he’s probably guilty (since most defendants are eventually convicted) and hope the crime has been solved, they also believe that he should be presumed innocent and treated fairly.”¹³⁷ Thus, under Kertzer’s reasoning, perp walks assuage the public’s intuition that criminal defendants, although probably guilty, deserve to be presumed innocent and treated fairly because they relate to institutions such as the courts, which protect the rights of defendants. However, if Kertzer’s view of the public’s conception of perp walks as both degrading the suspect, who is likely guilty, while assuring the public that he will be presumed innocent and treated fairly is correct, the public is deluding itself. As discussed above, perp walks erode the presumption of innocence and provide an avenue where law enforcement and prosecutors routinely treat suspects differentially and unfairly.

Finally, in rare cases, perp walks lead to danger to the safety and well-being of the accused paraded in front of the media.¹³⁸ Law enforcement officers often take little care for the safety of the suspect they are escorting.¹³⁹ Two incidents in the last half-century demonstrate the inherent danger of perp walks.¹⁴⁰ Perhaps the most famous instance of a suspect being harmed during a perp walk is the gunning-down of Lee Harvey Oswald by Jack Ruby in the basement of the Dallas police headquarters.¹⁴¹ Equally

¹³⁴ DAVID I. KERTZER, *RITUAL, POLITICS, AND POWER* 28 (1988).

¹³⁵ Tierney, *supra* note 130 (quoting anthropologist David Kertzer).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See generally Ruiz & Treadwell, *supra* note 32, at 47.

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

tragic, though with less notoriety, was the assassination of Gary Doucet, a suspect charged with kidnapping and child molestation, who was shot and killed by the father of the victim during a perp walk.¹⁴² The officers accompanying Doucet had allowed him to walk in front of them in order to give the media a good view.¹⁴³ Thus, the officers' actions in facilitating the media in capturing Doucet's image likely put him in danger and contributed to his death as it increased his exposure to the shooter. If they had prioritized the safety of the suspect in their custody over their agenda in assisting the media in gathering images of the suspect, the suspect's death might have been prevented.

II. THE LAW OF PERP WALKS

Given the disturbing aspects of perp walks described above, defense attorneys and civil rights groups decry perp walks as violative of the constitutional rights of criminal defendants.¹⁴⁴ They claim that the use of perp walks by law enforcement eviscerates the privacy of defendants, eradicates the presumption of innocence, prejudices juries, and shames and punishes defendants.¹⁴⁵ However, the perceived improprieties and inequities that characterize the approach to perp walks taken by law enforcement and prosecutors do not necessarily render their actions unconstitutional. The federal courts have examined perp walks on remarkably few occasions. The Supreme Court has never addressed the propriety of perp walks, and the Second Circuit is the only court of appeals to do so. In a series of decisions, the Second Circuit delineated the contours of constitutionally acceptable perp walks.¹⁴⁶ This general framework has generally been employed by federal district courts considering the constitutionality of perp walks, in-

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See, e.g., Weiser, *supra* note 78.

¹⁴⁵ See, e.g., Kaiser, *supra* note 3, at 1210-11; Weiser, *supra* note 78.

¹⁴⁶ See *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 572-77 (2d Cir. 2003); *Lauro v. Charles*, 219 F.3d 202, 206-14 (2d Cir. 2000); *Rosenberg v. Martin*, 478 F.2d 520, 524-26 (2d Cir. 1973).

cluding those that are outside the Second Circuit and not bound by its decisions.¹⁴⁷

Under the perp walk doctrine as developed by the Second Circuit and district courts, perp walks do not violate a defendant's penumbral right to privacy articulated in the reproductive rights context.¹⁴⁸ However, the perp walk doctrine does afford criminal defendants some protection of their privacy rights against perp walks under the Fourth Amendment right to privacy against unreasonable searches and seizures. Under the perp walk doctrine, a staged perp walk, a perp walk conducted solely for benefit of the press and advancing no specific legitimate law enforcement objectives, is unreasonable and violates a defendant's Fourth Amendment privacy rights.¹⁴⁹ However, a choreographed perp walk, one that advances a legitimate government purpose, such as legitimately moving a suspect in custody, but is executed in a manner that facilitates exposure of the suspect in custody to the media, is permissible.¹⁵⁰ Under this standard, a wholly staged perp walk is unconstitutional, but a severely choreographed one, where law enforcement officers collude with the media to achieve maximum exposure of the suspect in custody, comports with the Fourth

¹⁴⁷ See *Gibbons v. Lambert*, 358 F. Supp. 2d 1048, 1071-73 (D. Utah 2005); *Watkins v. City of Highland Park*, 232 F. Supp. 2d 744, 757-61 (E.D. Mich. 2002); *Otero v. Town of Southampton*, 194 F. Supp. 2d 167, 181 (E.D.N.Y. 2002); *Camiolo v. State Farm Fire & Cas. Co.*, No. 00-3696, 2002 U.S. Dist. LEXIS 25708, at *25-26 (E.D. Pa. Feb. 1, 2002); see also *United States v. Fastow*, 292 F. Supp. 2d 914, 918-19 (S.D. Tex. 2003) (upholding a perp walk that would be constitutional under the Second Circuit's approach with little explanation); *United States v. McVeigh*, 118 F. Supp. 2d 1137, 1154 (D. Colo. 2000) (employing logic similar to that of Second Circuit). It should be noted that in the development of the perp walk doctrine, some district courts adopted the same position ultimately taken by the Second Circuit with respect to a given issue pertaining to perp walks prior to the Second Circuit. In particular, several district courts limited the Second Circuit's holding in *Lauro* that staged perp walks were unconstitutional to that context and found that perp walks related to the legitimate transportation of a suspect were constitutional before the Second Circuit reached this conclusion in *Caldarola*.

¹⁴⁸ See *Rosenberg*, 478 F.2d at 524-25; see also *Lauro*, 219 F.3d at 206-09 (following *Rosenberg*).

¹⁴⁹ See *Lauro*, 219 F.3d at 213; see also *Caldarola*, 343 F.3d at 576 (following *Lauro*).

¹⁵⁰ See *Caldarola v. Cnty. of Westchester*, 142 F. Supp. 2d 431, 443 (S.D.N.Y. 2001); see also *Caldarola*, 343 F.3d at 576-77; *Watkins*, 232 F. Supp. 2d at 760.

Amendment.¹⁵¹ Likewise, other law enforcement conduct involving colluding with or assisting the press in capturing images of the transportation of a suspect in custody, such as the exhibition and distribution of a videotape of a perp walk to the press, has been held constitutional as long as the perp walk involved the legitimate transportation of the suspect.¹⁵² Thus, a perp walk is constitutional as long as it is not staged—i.e., any perp walk associated with the legitimate movement of a suspect in custody is constitutional regardless of police conduct to facilitate and exacerbate exposure of the suspect to the media during or in conjunction with the event.

This Part explores the development and the contours of the perp walk doctrine. First, this Part describes the early rejection of the application of the penumbral right to privacy to perp walks. Second, this Part explores the Fourth Amendment right to privacy and its application in the development of the perp walk doctrine.

A. Perp Walks Do Not Violate a Suspect's Penumbral Right to Privacy

In 1973, the Second Circuit decided *Rosenberg v. Martin*,¹⁵³ the first case presenting the issue of the constitutionality of perp walks in a federal appellate court. In *Rosenberg*, the Second Circuit held that inflammatory and prejudicial publicity stemming from a perp walk did not constitute a violation of the defendant's penumbral right to privacy.¹⁵⁴ The penumbral substantive due process privacy right is not tied to a specific constitutional provision; it was established in a series of cases dealing with reproductive rights.¹⁵⁵ The court noted that the Supreme Court had extended this right "only [to] the most intimate phases of personal life," involving reproductive choices such as the use of contraceptives and abortion.¹⁵⁶ The court concluded that a suspect's privacy

¹⁵¹ See Kaiser, *supra* note 3, at 1226.

¹⁵² See *Caldarola*, 343 F.3d at 576-77.

¹⁵³ 478 F.2d 520 (2d Cir. 1973).

¹⁵⁴ *Id.* at 524-25.

¹⁵⁵ See *Lauro v. Charles*, 219 F.3d 202, 209 (2d Cir. 2000).

¹⁵⁶ *Rosenberg*, 478 F.2d at 524-25 (citing *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

interest abrogated by a perp walk did not implicate the same intimate details that reproductive choices entail.¹⁵⁷ Indeed, a criminal defendant's privacy interest to avoid being observed by the press in custody is of lesser degree than an individual's privacy interest in reproductive choice. Thus, the *Rosenberg* court refused to extend the boundaries of the penumbral substantive due process right to privacy to the perp walk context, especially given that the right was not grounded in a specific constitutional provision.¹⁵⁸ However, the court indicated that it did not conclude that conduct of police officers toward suspects could never constitute a violation of the penumbral right to privacy.¹⁵⁹ For instance, the court suggested that the publication of nude photographs of a suspect in custody or exhibition of the suspect in the nude to the press would violate the suspect's right to privacy.¹⁶⁰ Unlike a perp walk, this situation implicates an intimate aspect of the suspect's life similar to reproductive rights.

After *Rosenberg*, several Supreme Court decisions in other contexts lent support to the conclusion that perp walks do not violate a suspect's penumbral right to privacy. Based on these decisions, in addition to *Rosenberg*, the Second Circuit approvingly cited its conclusion in *Rosenberg* that perp walks do not violate the penumbral right to privacy when it decided *Lauro v. Charles*¹⁶¹ in 2000, finding that a claim regarding a perp walk is best analyzed under the Fourth Amendment.¹⁶² In *Paul v. Davis*,¹⁶³ the Supreme Court held that the police did not violate the privacy rights of shoplifting suspects when they distributed photographs of individuals arrested for shoplifting, but not convicted of the offense (as well as photographs of convicted shoplifters) to merchants.¹⁶⁴ The

For further discussion of the right to privacy developed in the reproductive rights context, see NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW § 8.05 (3d ed. 2005).

¹⁵⁷ See *Rosenberg*, 478 F.2d at 524-25.

¹⁵⁸ See *id.* at 525.

¹⁵⁹ See *id.*

¹⁶⁰ *Id.* (citing *York v. Story*, 324 F.2d 450 (9th Cir. 1963)).

¹⁶¹ 219 F.3d 202 (2d Cir. 2000).

¹⁶² *Id.* at 208.

¹⁶³ 424 U.S. 693 (1976).

¹⁶⁴ *Id.* at 712-14. As noted in *Lauro*, the *Paul* Court also concluded that an "individual's interest in his reputation is not—without more—a protectible [*sic*] liberty or prop-

Court found that privacy rights protected by the penumbral right to privacy are limited to privacy rights that are “fundamental” or “implicit in the concept of ordered liberty.”¹⁶⁵ Thus, the Court concluded that the penumbral right to privacy applies in situations where the state attempts to regulate freedom of action in a private sphere of action, and does not extend to preclude the state from publicizing official acts such as arrests.¹⁶⁶ Accordingly, *Paul* supports the conclusion that perp walks do not offend a suspect’s penumbral right to privacy as perp walks, like the photographs in *Paul*, serve to publicize arrests.¹⁶⁷ Indeed, as discussed above, the privacy interest in averting a perp walk is lesser than the privacy interests the Court considers protected by the penumbral right to privacy.

Furthermore, the Supreme Court held that “where a claim can be characterized as a violation of the Fourth Amendment, it should be analyzed as such, and not as a substantive due process claim.”¹⁶⁸ The Fourth Amendment only applies when a search or seizure has occurred.¹⁶⁹ Thus, substantive due process analysis is appropriate when no search or seizure occurs.¹⁷⁰ Although the Court’s right to privacy cases do not rest on a particular constitutional provision, they “deal generally with substantive . . . [due

erty interest within the meaning of the Due Process Clause . . .” in rejecting a Fourteenth Amendment due process claim apart from the penumbral right to privacy claim. *Lauro v. Charles*, 219 F.3d 202, 206 (2d Cir. 2000) (citing *Paul*); see *Paul*, 424 U.S. at 701-12. Thus, *Paul* forecloses arguments that liberty or property interests under the Due Process Clause could render perp walks unconstitutional on the basis of reputational harm. 424 U.S. at 711-12.

¹⁶⁵ *Paul*, 424 U.S. at 713. Activities falling within this definition include matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See *infra* notes 286 and accompanying text.

¹⁶⁸ *Lauro*, 219 F.3d at 208 (citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998)); see also *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)) (“Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.” (internal quotation marks omitted)).

¹⁶⁹ See *Lewis*, 523 U.S. at 843.

¹⁷⁰ See *id.* at 842-45.

process rights under] the Fourteenth Amendment.”¹⁷¹ Thus, the Second Circuit in *Lauro* concluded that because a “perp walk . . . is best viewed as an exacerbation of the seizure that occur[s] when [a suspect is] arrested,” it should be analyzed under the Fourth Amendment rather than under the more generalized right to privacy which is grounded, at least in part, on the notion of substantive due process.¹⁷²

*B. Staged Perp Walks But Not Non-staged or Choreographed
Perp Walks Are Inconsistent with the Right to Privacy
Embodied in the Fourth Amendment*

The dimensions of the privacy rights established by the Fourth Amendment are quite different than those protected by the penumbral right to privacy articulated by the Court in the reproductive rights context. The Fourth Amendment right to privacy is “both more specific and less absolute” than the generic notions invoked by the Court in the reproductive rights context.¹⁷³ The Fourth Amendment privacy right is more specific than the penumbral right to privacy inasmuch as Fourth Amendment protections of privacy only apply when a search or seizure has occurred.¹⁷⁴ As described below, “a Fourth Amendment examination of a search or seizure [. . .] “requires a contextualized reasonableness analysis that seeks to balance the intrusion on privacy caused by law enforcement against the justification asserted for it by the state.”¹⁷⁵ In contrast, “[c]ases” involving [the] unspecified [penumbral] substantive due process privacy right[] . . . focus on areas where privacy is implicit in the concept of ordered liberty, and within which the government [may not] regulate . . . absent a compelling interest.”¹⁷⁶ Thus, as the Fourth Amendment privacy right entails balancing between government and privacy interests, it is less absolute than the penumbral right to privacy that can only be constitutionally impinged on by the government to vindicate

¹⁷¹ *Paul*, 424 U.S. at 713.

¹⁷² *Lauro*, 219 F.3d at 208.

¹⁷³ *Id.* at 209.

¹⁷⁴ *See Lewis*, 523 U.S. at 843.

¹⁷⁵ *Lauro*, 219 F.3d at 209 (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

¹⁷⁶ *See id.* (citing *Paul*, 424 U.S. at 713; *Roe v. Wade*, 410 U.S. 113, 152, 155 (1973)).

cate a compelling interest. Consequently, even if an arrestee cannot assert a violation of the penumbral right to privacy, it does not follow that the same government actions are necessarily valid under the Fourth Amendment's reasonableness requirement.¹⁷⁷ Therefore, "cases delineating the scope of the substantive right to privacy do not control [analysis under the Fourth Amendment right to privacy]."¹⁷⁸ Accordingly, as the Second Circuit concluded in *Lauro*, its previous rejection of a suspect's claim that a perp walk violated the penumbral substantive privacy right in *Rosenberg* (as well as the Supreme Court's decision in *Paul* with respect to the penumbral right to privacy in a context bearing some similarities to perp walks) was not dispositive of a suspect's claim that a perp walk violated her Fourth Amendment privacy rights.¹⁷⁹

This Part explores the application of the Fourth Amendment right to privacy in the perp walk context. First, this Part provides an overview of the Fourth Amendment right to privacy and its development. Second, this Part examines the evolution of the perp walk doctrine developed by the Second Circuit and lower courts under the Fourth Amendment right to privacy. Under this framework, a wholly staged perp walk is unconstitutional as violative of the suspect's Fourth Amendment right to privacy, but any perp walk that advances a legitimate government interest, even one that is severely choreographed and involves collusion between law enforcement officers and the media to achieve maximum exposure of the suspect in custody, comports with the Fourth Amendment.¹⁸⁰

1. The Fourth Amendment Right to Privacy

The history of the Fourth Amendment suggests that the Framers primarily intended the Amendment to protect property rather than privacy.¹⁸¹ Indeed, the text of the Fourth Amendment

¹⁷⁷ See *id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 206-09.

¹⁸⁰ See Kaiser, *supra* note 3, at 1226.

¹⁸¹ See, e.g., DARIEN A. MCWHIRTER, SEARCH, SEIZURE, AND PRIVACY 2 (1994); Ashlea Wright, Note, *Wilson v. Layne: Increasing the Scope of the Fourth Amendment Right to Privacy*, 28 PEPP. L. REV. 163, 166 (2000); Kaiser, *supra* note 3, at 1213.

focuses on property and does not mention privacy, and it is not at all obvious from the text that it prescribes a right to privacy outside of a citizen's interest in her property.¹⁸² Prior to the 1960s, "the Court primarily interpreted the Fourth Amendment's protections against unreasonable search and seizure as a protection of property, rather than privacy interests."¹⁸³ The Court required government actors to invade such property rights for their actions to be considered a search or seizure under the Fourth Amendment, and accordingly a violation of property rights was required to make out a violation of the Fourth Amendment.¹⁸⁴ Thus, the Court considered property rights to determine the scope of the Fourth Amendment's protections rather than an independent right to privacy.¹⁸⁵ Indeed, the Court held the view, reminiscent of the tort of trespass, that a physical invasion into "a constitutionally protected area" was required for a Fourth Amendment violation.¹⁸⁶

However, in the 1960s, the Court moved away from the idea that property rights delineate the scope of the Fourth Amendment.¹⁸⁷ In 1967, the Court decided *Warden v. Hayden*,¹⁸⁸ where it specifically rejected the idea that property rights were determinative of Fourth Amendment protections, concluding that "the prin-

¹⁸² U.S. CONST. amend. IV (providing that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized").

¹⁸³ Wright, *supra* note 181, at 166.

¹⁸⁴ See *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (holding that the Fourth Amendment is not violated "unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house or curtilage for the purpose of making a seizure" (internal quotation marks omitted)).

¹⁸⁵ See Wright, *supra* note 181, at 166-67 (citing William C. Heffernan, *Property, Privacy, and the Fourth Amendment*, 60 BROOK. L. REV. 633, 638-40 (1994)).

¹⁸⁶ *Silverman v. United States*, 365 U.S. 505, 512 (1961). The constitutionally protected areas were enumerated in the Fourth Amendment itself: "persons" including the bodies and attire of individuals; "houses" including apartments, hotel rooms, garages, business offices, stores, and warehouses; "papers" such as letters; and "effects" such as automobiles. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.2, at 127-38 (4th ed. 2004) (collecting cases).

¹⁸⁷ See Wright, *supra* note 181, at 167.

¹⁸⁸ 387 U.S. 294 (1967).

cipal object of the Fourth Amendment is the protection of privacy rather than property.”¹⁸⁹ The *Hayden* Court explained its decision by noting that the “shift in emphasis from property to privacy [culminating in its rejection of its narrow conception of the Fourth Amendment] has come about through a subtle interplay of substantive and procedural reform.”¹⁹⁰ Indeed, the Court pointed out that the evolution of Fourth Amendment law in a series of cases leading up to *Hayden* eroded the principle that the Fourth Amendment only protected property.¹⁹¹ In these cases, the Court held that the Fourth Amendment protected intangible as well as tangible property, and that actual trespass under local law is unnecessary for a Fourth Amendment violation.¹⁹² Furthermore, the Court had previously acknowledged privacy rights under the Fourth Amendment in tangible property that was not protected by common law property rights, such as stolen goods, instrumentalities of crime, and contraband.¹⁹³

Hayden involved the seizure of clothing, a tangible item, and thus did not expressly decide the question as to whether the right to privacy alone provided a legitimate basis for Fourth Amendment rights.¹⁹⁴ In *Katz v. United States*,¹⁹⁵ the Court held that the Fourth Amendment governs not only the seizure of tangible items, but also extends to the recording of oral statements, overheard without any “technical trespass under . . . local property law.”¹⁹⁶ The Court concluded that, generally speaking, spatial boundaries do not confine Fourth Amendment rights, reasoning that the Fourth Amendment protects people, not places or areas, against unreasonable searches and seizures.¹⁹⁷ Thus, the *Katz* Court concluded that a wiretap to record a defendant’s conversation in a

¹⁸⁹ *Id.* at 304.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 305-06.

¹⁹² See *id.* at 305 (citing *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963); *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

¹⁹³ See *Hayden*, 387 U.S. at 305-06 (citing *Beck v. Ohio*, 379 U.S. 89 (1964); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Henry v. United States*, 361 U.S. 98 (1959); *McDonald v. United States*, 335 U.S. 451 (1948); *Trupiano v. United States*, 334 U.S. 699 (1948)).

¹⁹⁴ *Hayden*, 387 U.S. at 297-300.

¹⁹⁵ 389 U.S. 347 (1967).

¹⁹⁶ *Id.* at 353 (quoting *Silverman*, 365 U.S. at 511).

¹⁹⁷ *Id.* at 351, 353.

public telephone booth was a search and seizure subject to the protections of the Fourth Amendment, because "[t]he [g]overnment's activities in electronically listening to and recording the [defendant]'s words violated the privacy upon which he justifiably relied while using the telephone booth"¹⁹⁸ These remarks indicate that the Court considered privacy a separate and independent basis for Fourth Amendment protections in addition to liberty and property interests.¹⁹⁹ However, the Court qualified the Fourth Amendment right to privacy by stating that "the Fourth Amendment cannot be translated into a general constitutional right to privacy [or right to be left alone by other people]."²⁰⁰ The Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion" while other constitutional provisions "protect personal privacy from other forms of governmental invasion."²⁰¹ The Court later suggested the boundaries of the types of intrusion to which the Fourth Amendment right to privacy is limited. In *Paul*, the Court indicated that the Fourth Amendment creates a "zone[] of privacy" . . . impos[ing] limits upon government[al] power" regarding matters within the scope of the protections conferred by the Fourth Amendment—unreasonable searches and seizures.²⁰²

Katz and its progeny addressed the Fourth Amendment privacy right in terms of defining a search which is subject to the strictures of the Fourth Amendment, and determining when the Fourth Amendment protection against unreasonable searches ap-

¹⁹⁸ *Id.* at 353.

¹⁹⁹ See Wright, *supra* note 181, at 168; Heffernan, *supra* note 185, at 642-43.

²⁰⁰ *Katz*, 389 U.S. at 350 (internal quotation marks omitted).

²⁰¹ *Id.* The *Katz* Court also noted that the protections of the Fourth Amendment "go further [than the right to privacy], and often have nothing to do with privacy at all." *Id.* Examples include protection of property and liberty interests.

²⁰² *Paul v. Davis*, 424 U.S. 693, 700, 712-13 (1976) (internal quotation marks omitted). The Court indicated that the dissemination of flyers containing photographs of arrestees did not come within this area, noting that it did not involve suppression of evidence obtained in an unreasonable search. See *id.* at 712-13. The Court made these statements in the context of a claim alleging a violation of the "right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments," noting that while there is no right of privacy found in any specific constitutional provision, zones of privacy may be created by more specific constitutional provisions and thereby impose limits on governmental power. See *id.* The *Paul* Court did not engage in any specific Fourth Amendment analysis beyond these statements.

plied.²⁰³ In his concurring opinion in *Katz*, Justice Harlan set forth a two-part test for determining when a search occurs, and thus when the protections of the Fourth Amendment are implicated in terms of protection of privacy.²⁰⁴ A search occurs under circumstances where (1) a person has exhibited an actual subjective expectation of privacy and (2) the expectation of privacy is one that society is prepared to recognize as reasonable.²⁰⁵ The Court officially adopted this language as its test for whether a search has occurred over a decade after it decided *Katz*.²⁰⁶

After *Katz*, the Court extended the “reasonable expectation of privacy” language to the seizure context. In *Terry v. Ohio*,²⁰⁷ the Court concluded that “wherever an individual may harbor a reasonable expectation of privacy, he is entitled to be free from . . . governmental intrusion.”²⁰⁸ However, the Fourth Amendment does not forbid all searches and seizures violating a person’s rights to security and privacy; it only protects against violation of these rights by unreasonable searches and seizures.²⁰⁹ In determining the reasonableness of a given search or seizure, the Court employs a case-by-case balancing approach examining all of the circumstances and weighing the nature and scope of the intrusion against the government’s justifications for the intrusion.²¹⁰ The

²⁰³ See Wright, *supra* note 181, at 169. Government conduct must constitute a search or seizure to fall under the strictures of the Fourth Amendment. See, e.g., *id.* at 169-70.

²⁰⁴ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

²⁰⁵ *Id.*

²⁰⁶ See *Smith v. Maryland*, 442 U.S. 735, 740-41 (1979). The Court has defined a seizure of property as occurring when there is some meaningful interference with an individual’s possessory interest in that property. See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Additionally, a seizure of a person is defined as occurring when, by means of physical force or a show of authority, her freedom of movement is restrained. See *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (plurality opinion). Similar to the test used with searches, the Court determines if a seizure of a person or property has occurred by looking at the totality of the circumstances and how a reasonable person would act in the situation. See, e.g., Wright, *supra* note 181, at 170.

²⁰⁷ 392 U.S. 1 (1968).

²⁰⁸ *Id.* at 9 (internal citation omitted) (finding that a person is entitled to the protection of the Fourth Amendment on a public street in determining that a “stop and frisk” involves a search and seizure).

²⁰⁹ See *id.*

²¹⁰ See, e.g., *United States v. Place*, 462 U.S. 696, 703 (1983) (balancing “competing interests to determine the reasonableness of the type of seizure involved within the

Fourth Amendment reasonableness requirement applies not only to prevent searches and seizures that would be unreasonable if conducted at all, but also demands reasonableness in the manner in which otherwise reasonable searches are carried out as well as in their scope.²¹¹ Like the reasonableness of a given search or seizure per se, the Court evaluates the reasonableness of the manner in which law enforcement conducts an otherwise reasonable and lawful seizure by engaging in "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake" on a case-by-case basis.²¹² Thus, the Court has indicated that the reasonableness of law enforcement actions in conducting a search or seizure must be judged, at least in part, by assessing the degree to which those actions further the legitimate law enforcement purposes behind the search or seizure.²¹³ At a minimum, the Fourth Amendment requires that police action in carrying out a lawful search or seizure be related to the justifications

meaning of the Fourth Amendment's general proscription against unreasonable searches and seizures" (internal citation omitted)); *Terry*, 392 U.S. at 9 ("[T]he specific content and incidents of this right must be shaped by the context in which it is asserted."); Wright, *supra* note 181, at 170 (citing cases and secondary sources). All cases addressing perp walks hitherto litigated involve perp walks in conjunction with lawful arrests. Thus, the contours of what constitutes a reasonable search and seizure outside of contexts related to perp walks are beyond the scope of this Article. For further discussion of the reasonableness of searches and seizures, see Wright, *supra* note 181, at 170-71; LAFAVE ET AL., *supra* note 186, ch. 3.

²¹¹ See *Graham v. Connor*, 490 U.S. 386, 395 (1989) ("[T]he reasonableness of a particular seizure depends . . . on *how* it is carried out." (emphasis in original) (internal citation and quotation marks omitted)); *Ayeni v. Mottola*, 35 F.3d 680, 684 (2d Cir. 1994) (following *Graham*).

²¹² *Graham*, 490 U.S. at 396 ("Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case" (internal citations and quotation marks omitted)). For example, factors relevant to the reasonableness of the degree of force used to effect an arrest include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

²¹³ See *Wilson v. Layne*, 526 U.S. 603, 611 (1999) ("[T]he Fourth Amendment does require that police actions in [the] execution of a warrant be related to the objectives of the authorized intrusion" (citing *Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *Maryland v. Garrison*, 480 U.S. 79, 87 (1987))).

for the lawful intrusion on the suspect's Fourth Amendment rights.²¹⁴

The Supreme Court has never addressed whether perp walks comport with the Fourth Amendment. There is authority indicating that the Fourth Amendment "shields arrestees from police conduct that unreasonably aggravates the intrusion on privacy properly occasioned by [an] initial seizure [that comports with the Fourth Amendment]."²¹⁵ The Supreme Court addressed Fourth Amendment privacy under the principles explained above in a facially related context in *Wilson v. Layne*²¹⁶ where it held that a media ride-along during the execution of an arrest warrant in a private home violated the Fourth Amendment.²¹⁷ In *Wilson*, state and federal officers accompanied by newspaper reporters executed an arrest warrant at a private home.²¹⁸ The reporters observed the scene and took photographs, but did not participate in the execution of the warrant, the attempted arrest, or any related searches.²¹⁹ The Court first noted the great respect that the Fourth Amendment accords to the home and that, absent a warrant or exigent circumstances, police could not enter the home to make an arrest.²²⁰ In reaching its decision, the Court relied on the notion

²¹⁴ See *Wilson*, 526 U.S. at 611; see also *Terry*, 392 U.S. at 19-20 ("[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.").

²¹⁵ *Lauro v. Charles*, 219 F.3d 202, 212 (2d Cir. 2000) (Ginsburg, J., concurring) (citing *Albright v. Oliver*, 510 U.S. 266, 277-79 (1994) (noting that the seizure of a defendant continues throughout pretrial detention, that police action that perpetuates such a seizure unreasonably violates the Fourth Amendment, and that this view is supported by the common law conception of seizures); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (holding that the Fourth Amendment precluded strip searches of misdemeanor arrestees while in custody in the absence of reasonable suspicion)). Issues regarding temporal scope of the Fourth Amendment and a seizure for its purposes vis-a-vis pretrial detention are discussed in Part IV.B, *infra*.

²¹⁶ 526 U.S. 603 (1999).

²¹⁷ *Id.* at 605.

²¹⁸ *Id.* at 607.

²¹⁹ See *id.* at 607-08.

²²⁰ See *id.* at 610-11 (citing *Payton v. New York*, 445 U.S. 573, 602 (1980)). The Court noted that because they had a warrant, the officers were undoubtedly entitled to enter the home to execute the warrant. See *id.* at 611. However, the Court went on to indicate that this did not mean that the officers were entitled to bring members of the media with them. See *id.*

that the Fourth Amendment requires that police actions in the execution of a warrant be related to the legitimate law enforcement objectives of the authorized intrusion.²²¹ The Court found that because the reporters did not engage in the execution of the warrant and did not assist the police in doing so, "[t]he reporters therefore were not present for any reason related to the justification for police entry into the home" and rejected several claims by the government that the presence of the reporters served a legitimate law enforcement purpose.²²²

First, the Court rejected the government's claim that law enforcement should be able to exercise reasonable discretion in determining whether it would "further the[] law enforcement mission to permit members of the news media to accompany [law enforcement officers] in executing a warrant," reasoning that this claim "ignore[d] the importance of the right of residential privacy at the core of the Fourth Amendment."²²³ The Court acknowledged that media ride-alongs might further law enforcement objectives in a general sense.²²⁴ However, it concluded that generalized law enforcement objectives are not the same as furthering the specific purposes of the search and are insufficient to trump the Fourth Amendment.²²⁵ If Fourth Amendment rights could be subordinated to such objectives, the protections guaranteed by the Fourth Amendment would be significantly attenuated.²²⁶

Second, the Court rejected the argument that the presence of reporters could serve the law enforcement purposes of publicizing the government's efforts to combat crime and facilitating accurate reporting of law enforcement activities.²²⁷ While the Court acknowledged the importance of the press in informing the public about the administration of criminal justice as a right protected by the First Amendment, the Court noted that the Fourth Amendment also protected an important right, and that media ride-

²²¹ See *id.* at 611 (citing *Arizona v. Hicks*, 480 U.S. 321, 325 (1987)).

²²² *Id.* ("Certainly the presence of the reporters inside the home was not related to the objectives of the authorized intrusion.").

²²³ *Id.* at 612 (internal quotation marks omitted).

²²⁴ See *id.*

²²⁵ See *id.*

²²⁶ See *id.*

²²⁷ See *id.* at 612-13.

along with the execution of arrest warrants, an area squarely within the purview of the Fourth Amendment, must be judged in terms of the latter right.²²⁸ The Court reasoned that the possibility of good public relations or a good relationship between law enforcement and the press did not justify the ride-along intrusion into a private home.²²⁹ Furthermore, even the "need for accurate reporting on police issues . . . bears no direct relation to the constitutional justification for the police intrusion into a home in order to execute a felony arrest warrant."²³⁰

Finally, the Court also rejected the government's contention that the presence of the press could serve in some situations to minimize abuse by the police and protect suspects, and also to protect the safety of the arresting officers.²³¹ The reporters were working on a story for their own purposes and were not present during the execution of the warrant to protect the officers or the suspects as evidenced in part by the fact that the newspaper, and not the police, retained the photographs taken by the reporters.²³²

Therefore, the *Wilson* Court concluded that the reasons advanced by the government, taken in their entirety, "fall short of justifying the presence of [the] media inside [the] home" and held that the Fourth Amendment is violated when the police "bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant."²³³

2. A Staged Perp Walk Violates the Fourth Amendment

With the principles discussed above looming in the background, the Second Circuit first addressed the issue of whether a perp walk comported with the Fourth Amendment in *Lauro*.

²²⁸ *See id.*

²²⁹ *See id.* at 613.

²³⁰ *Id.*

²³¹ *See id.*

²³² *See id.*

²³³ *Id.* at 614. In *Hanlon v. Berger*, 526 U.S. 808 (1999) (per curiam), decided the same day as *Wilson*, the Supreme Court relied on its finding in *Wilson* that "police violate the Fourth Amendment rights of homeowners when they allow members of the media to accompany them during the execution of a warrant in their home," to summarily find a Fourth Amendment violation had been alleged. *Id.* at 809-10.

Lauro involved a prototypic staged perp walk. In *Lauro*, the suspect, an apartment building doorman, was arrested for allegedly committing thefts in the building where he worked.²³⁴ After running a story about the suspect's thefts, two news producers realized they wanted more footage of the suspect and contacted the office of the police department's deputy commissioner of public information. The office of the deputy commissioner then contacted the arresting officer who was with the suspect in the precinct squad room and informed him that the media was interested in the case and that the suspect should be taken on a perp walk.²³⁵ The officer handcuffed the suspect, walked him out the front door of the stationhouse, placed him in a police car, drove around the block, removed him from the car, and walked him back into the stationhouse.²³⁶ The perp walk was filmed by a news crew, and footage of the walk was broadcast on television.²³⁷

In evaluating whether this perp walk comported with the Fourth Amendment, the Second Circuit first concluded that the perp walk intruded on interests protected by the Fourth Amendment.²³⁸ The government attempted to distinguish the perp walk from the ride-along situation faced by the Court in *Wilson* on the ground that *Wilson* turned on the special status of the home or the idea that the Fourth Amendment's privacy protections did not extend outside of the home.²³⁹ The court emphatically rejected this argument reasoning that the Supreme Court did not set spatial boundaries for the rights protected by the Fourth Amendment, including the right to privacy, as it considered the Fourth Amendment to "protect[] people, not places."²⁴⁰ Thus, the court concluded that *Wilson* did not turn solely on the special status of

²³⁴ *Lauro v. Charles*, 219 F.3d 202, 204 (2d Cir. 2000).

²³⁵ *See id.*

²³⁶ *See id.* at 204-05.

²³⁷ *See id.* at 205.

²³⁸ *See id.* at 211-12. In *Lauro*, the district court (prior to *Wilson*) found that the staged perp walk at issue was unreasonable and violated the Fourth Amendment as it implicated Fourth Amendment interests and did not serve any legitimate law enforcement purpose. *Lauro v. City of New York*, 39 F. Supp. 2d 351 (S.D.N.Y. 1999).

²³⁹ *See Lauro*, 219 F.3d at 211. The *Lauro* court also applied this reasoning to *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), a Second Circuit case decided prior to *Wilson* finding that a media ride-along violated the Fourth Amendment.

²⁴⁰ *Lauro*, 219 F.3d at 211 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

the home and that Fourth Amendment privacy protection did not only apply in the home.²⁴¹ However, the court conceded that the place where police conduct occurs is not irrelevant to analysis of whether the conduct violates the Fourth Amendment right to privacy, but also pronounced that it could not be determinative.²⁴² The Second Circuit also relied on the Supreme Court's general statements in *Terry* indicating that the question of whether the Fourth Amendment is violated turns on whether an individual's right to personal security and privacy is impinged upon by an unreasonable search or seizure, irrespective of the location of the police conduct considering all the circumstances, and that the Fourth Amendment applies wherever an individual "may harbor a reasonable expectation of privacy."²⁴³ Finally, the court noted the Fourth Amendment applies to arrestees lawfully in police custody as it "shields arrestees from police conduct that unreasonably aggravates the intrusion on privacy properly occasioned by [an] initial seizure [that comports with the Fourth Amendment]."²⁴⁴ Thus, the fact that the suspect was lawfully under arrest in a manner consistent with the Fourth Amendment when the perp walk occurred does not mean that the perp walk itself did not violate the Fourth Amendment.²⁴⁵

Thus, given its conclusion, consistent with and based on Supreme Court precedent, that the Fourth Amendment right to privacy applied outside the home, the Second Circuit found that the perp walk in *Lauro* infringed on interests protected by the Fourth Amendment. The suspect was physically restrained with hand-

²⁴¹ See *id.*

²⁴² See *id.*

²⁴³ *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 9 (1968)).

²⁴⁴ *Id.* at 212 (citing *Albright v. Oliver*, 510 U.S. 266, 277-79 (1994) (Ginsburg, J., concurring) (noting that the seizure of a defendant continues throughout pretrial detention, that police action that perpetuates such a seizure unreasonably violates the Fourth Amendment, and that this view is supported by the common law conception of seizures); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (holding that the Fourth Amendment precluded strip searches of misdemeanor arrestees while in custody in the absence of reasonable suspicion)). Issues regarding temporal scope of the Fourth Amendment and a seizure for its purposes vis-a-vis pretrial detention are discussed in Part IV.B, *infra*.

²⁴⁵ See *Lauro*, 219 F.3d at 212.

cuffs and by the grip of a police officer.²⁴⁶ In this humiliating position, he was made to walk outside the stationhouse, driven around the block, and forced to walk back into the stationhouse in front of television cameras.²⁴⁷ A suspect has a privacy interest in not being "displayed to the world, against his will, in handcuffs, and in a posture connoting guilt."²⁴⁸ Thus, the police conduct was unquestionably an aggravation of the intrusion of privacy affected by the initial seizure which occurred when the suspect was arrested. Accordingly, the court concluded that the suspect was seized during the perp walk and that a perp walk intrudes on interests protected by the Fourth Amendment.²⁴⁹ The court found that for Fourth Amendment purposes, it is immaterial whether a perp walk is considered a separate seizure that occurred when the suspect is forcibly removed from the police station or jail and brought back in after being viewed by the media, or a continuation and aggravation of the original seizure that occurred when the suspect was arrested.²⁵⁰ The Fourth Amendment requires that any law enforcement conduct constituting a perp walk be reasonable.

The Second Circuit then addressed reasonableness and concluded that the staged perp walk that occurred in *Lauro* was an unreasonable infringement of the suspect's privacy and thus did not comport with the Fourth Amendment. The government argued that the importance of the press in informing the public about the administration of criminal justice was a legitimate governmental interest that rendered the perp walk reasonable.²⁵¹ The Second

²⁴⁶ See *id.*

²⁴⁷ See *id.*

²⁴⁸ See *id.* at 212 n.7.

²⁴⁹ Under this reasoning, almost all police conduct fairly described as a perp walk would impair interests protected by the Fourth Amendment and accordingly would be subject to its reasonableness requirement. The court conducted its Fourth Amendment analysis in a typical bipartite way, determining if interests protected by the Fourth Amendment were intruded upon or implicating, and if they were, whether the law enforcement actions were reasonable. See *id.* at 211.

²⁵⁰ See *Lauro*, 219 F.3d at 212-13. Neither the *Lauro* court nor any other court has ever decided this question. However, later in the opinion, the *Lauro* court described its holding as one that "the perp walk constituted an unreasonable exacerbation of the seizure that occurred when Lauro was arrested." *Id.* at 213. On the other hand, an additional seizure might be viewed as an exacerbation of a previous one.

²⁵¹ See *id.* at 212.

Circuit refused to accept this argument reasoning that it was explicitly rejected by the Supreme Court in *Wilson*, albeit in the media ride-along context.²⁵² The Second Circuit found this justification was a generalized law enforcement objective and thus was insufficient to overcome the suspect's Fourth Amendment rights, also relying on *Wilson* to indicate that the need for accurate reporting on police issues had no direct relation to the constitutional justifications for the arrest.²⁵³ Like the *Wilson* Court in the media ride-along context, the Second Circuit acknowledged that the press and the public, who might want to view perp walks, had an interest in doing so that was "far from negligible."²⁵⁴ The court further noted, however, that the press and the public were not "viewing the actual event of [the suspect] being brought to the police station, but rather . . . a staged recreation of that event."²⁵⁵ Thus, the court reasoned that even if it assumed that there was a legitimate state interest in the accurate reporting of police activity, that interest was not well served by a staged perp walk, "an inherently fictional dramatization of an event that transpired hours earlier."²⁵⁶ The Second Circuit made clear that in reaching this decision, it did not question the reasonableness of the initial arrest of the suspect and assumed the arrest was perfectly lawful.²⁵⁷ However, in staging the perp walk, the police "engaged in conduct that was unrelated to the object of the arrest, that had no legitimate law enforcement justification, and that invaded [the suspect's] privacy to no purpose."²⁵⁸ The court also noted its disapproval of two other justifications as generalized law enforcement objectives unable to trump Fourth Amendment rights—(1) that officers should have discretion to decide when it would further the mission of law enforcement to involve the media in law enforcement activities and (2) that the presence of the media could deter law enforcement abuses—that were also rejected in *Wil-*

²⁵² See *id.* (citing *Wilson v. Layne*, 526 U.S. 603, 612-13 (1999)).

²⁵³ See *id.* at 212-13.

²⁵⁴ *Id.* at 213.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ See *id.*

²⁵⁸ *Id.*

son.²⁵⁹ Therefore, the Second Circuit concluded, that like the media ride-along in *Wilson*, the perp walk that occurred in *Lauro* not only intruded upon the suspect's privacy protected by the Fourth Amendment, but also lacked any legitimate law enforcement purpose and exacerbated the suspect's seizure in an unreasonable manner.²⁶⁰ Accordingly, the perp walk violated the suspect's Fourth Amendment rights.

However, the *Lauro* court was extremely careful to restrict its holding to the staged perp walk context.²⁶¹ The court explicitly stated that it "[did] not hold that all, or even most, perp walks are violations of the Fourth Amendment," as it did not address the constitutionality of perp walks where there is a legitimate law enforcement justification for transporting a suspect in custody and the suspect is photographed in the normal course of being moved from one place to another by the police.²⁶² Furthermore, the court indicated that it did not reach the question of whether, in those circumstances, it would be proper for the police to notify the media ahead of time that a suspect is to be transported.²⁶³

²⁵⁹ *Id.* at 212 (citing *Wilson v. Layne*, 526 U.S. 603, 612-13 (1999)). Although *Lauro* does not indicate that the defendants specifically raised these justifications, it nonetheless stated its disapproval of them. The *Lauro* court noted that the Supreme Court in *Wilson* found these justifications insufficient to overcome the arrestee's Fourth Amendment rights and indicated that these justifications were generalized law enforcement objectives that were not themselves sufficient to trump the Fourth Amendment. *Id.* at 212-13. The latter statement is equally applicable to the perp walk context faced in *Lauro* as it is to the media ride-along at issue in *Wilson*. Indeed, the *Lauro* court noted the applicability of the *Wilson* Court's reasoning to the staged perp walk context. *See id.* at 213. Moreover, the *Lauro* court indicated that the staged perp walk at issue "lacked any legitimate law enforcement purpose," indicating that these justifications (and all others) were insufficient to support it. *Id.*

²⁶⁰ *See id.* at 213.

²⁶¹ *See id.*

²⁶² *Id.*

²⁶³ *Id.*

3. A Non-Staged Perp Walk Does Not Violate the Fourth Amendment Although it is Choreographed by Law Enforcement Acting in Conjunction With the Press or Otherwise Involves Law Enforcement Collusion With the Press

In the wake of *Lauro*, a district court in the Second Circuit faced the issues that the Second Circuit expressly refused to decide in that case—whether a perp walk for which there was a legitimate law enforcement justification for moving the suspect comported with the Fourth Amendment and whether under such circumstances it was proper for the police to notify the media of the transportation of the suspect—in *Caldarola v. County of Westchester*.²⁶⁴ In *Caldarola*, corrections officers were arrested for making fraudulent claims for disability benefits.²⁶⁵ They were arrested at a department of corrections facility and videotaped by a county employee walking in handcuffs from the facility through a parking lot, an area generally closed to the press, to police cars that took them to the police station for booking by a county employee.²⁶⁶ The county then held a press conference to publicize the investigation and crackdown on fraudulent job injury claims by corrections officers where officials played the tape for the press and distributed copies to members of the media.²⁶⁷ At the press conference, county officials provided notice to the press with respect to the time and place of the suspect's arraignment by alerting the press that the suspects were being transported to a particular courthouse for arraignment at the time of the press conference.²⁶⁸ Upon arrival at the courthouse, two of the suspects were left in the car in which they were transported for ten to fifteen minutes until the car carrying the other suspects arrived.²⁶⁹ During this period, the suspects in the car were filmed by the press.²⁷⁰ The suspects alleged that the drivers of the vehicles communicat-

²⁶⁴ 142 F. Supp. 2d 431 (S.D.N.Y. 2001), *aff'd*, 343 F.3d 570 (2d Cir. 2003).

²⁶⁵ *Caldarola*, 343 F.3d at 572; *see also* *Caldarola*, 142 F. Supp. 2d at 433.

²⁶⁶ *See* *Caldarola*, 343 F.3d at 572; *see also* *Caldarola*, 142 F. Supp. 2d at 434.

²⁶⁷ *See* *Caldarola*, 343 F.3d at 572; *see also* *Caldarola*, 142 F. Supp. 2d at 434-35.

²⁶⁸ *See* *Caldarola*, 343 F.3d at 572; *see also* *Caldarola*, 142 F. Supp. 2d at 435; Kaiser, *supra* note 3, at 1223.

²⁶⁹ *See* *Caldarola*, 343 F.3d at 572; *see also* *Caldarola*, 142 F. Supp. 2d at 435-36.

²⁷⁰ *See* *Caldarola*, 343 F.3d at 572; *see also* *Caldarola*, 142 F. Supp. 2d at 435-36.

ed with each other to choreograph the event by "instructing each other to get into position, stop at a particular place, and wait until everyone was ready."²⁷¹ When the other car arrived, the suspects alleged that the officers responsible for their transportation allowed the media to film them for several minutes as they sat in the vehicles.²⁷² The media then filmed the arrestees as they entered the courthouse.²⁷³

The videotape element of this case is closely related to, but slightly different from, the conventional choreographed perp walk situation. However, this case also involved a prototypic choreographed perp walk as law enforcement officials provided the media with information with respect to the time and location of a legitimate movement of a restrained suspect or suspects in custody.

On these facts, the district court held that the government had not engaged in any behavior constituting an unreasonable seizure, reaching the opposite result than that reached by the Second Circuit in *Lauro*.²⁷⁴ First, the district court found that the coordination of the arrests and the filming of the transportation of the suspects from the department of corrections facility did not implicate the suspects' Fourth Amendment rights.²⁷⁵ The district court held that the act of filming did not constitute a seizure.²⁷⁶ The court noted that the filming did not constitute a physical seizure, and the cameraman did not unreasonably intrude on the suspects' "space" as he was not inside the building during the arrests and did not film the arrests, did not approach the suspects unnecessarily while filming, and did not talk to the suspects.²⁷⁷ Next, the court found that the filming did not entail any physical intrusion that interfered with any possessory interest of the suspects, noting that the fact that a person can be found in a particular place at a particular time does not give rise to some possessory

²⁷¹ *Caldarola*, 142 F. Supp. 2d at 436.

²⁷² *See id.*

²⁷³ *See Caldarola*, 343 F.3d at 572; *see also Caldarola*, 142 F. Supp. 2d at 436.

²⁷⁴ *See Caldarola*, 142 F. Supp. 2d at 443; *see also Caldarola*, 343 F.3d at 573.

²⁷⁵ *See Caldarola*, 142 F. Supp. 2d at 438.

²⁷⁶ *See id.* at 438-39.

²⁷⁷ *See id.* at 439.

interest.²⁷⁸ Most important to the court's reasoning, the court found that the suspects had no possessory interest in not being videotaped.²⁷⁹ The court distinguished *Lauro* (and the district court's conclusion about the seizure of intangibles in that case that intangibles were seized during the perp walk) on the basis that the videotaping was not the unlawful seizure in that case, but rather the forcing of the suspect to participate in the fictitious staged event was.²⁸⁰ Furthermore, while finding that the arrests were choreographed, as the county required the suspects to appear at the same designated place and time (i.e., the department of corrections facility) where they were arrested, the suspects were not told why they were reporting to that place, one of the suspects waited some time before being arrested and led outside, and that this activity facilitated the county's ability to obtain the videotape, the district court held that these actions did not constitute an improper exacerbation of an otherwise lawful seizure, because legitimate law enforcement activity was filmed, rather than a wholly fictitious event, and the suspects' time before the camera was not prolonged beyond that which was necessary to walk from the building to the vehicles for transporting them.²⁸¹ The court went on to state that "*Lauro* should be limited to wholly fictitious events like the unnecessary perp walk [at issue in that case]."²⁸²

²⁷⁸ *Id.*

²⁷⁹ *See id.*

²⁸⁰ *See id.* The district court in *Lauro* found that intangibles such as the suspect's image and the sound of his voice were seized in a manner that implicates the Fourth Amendment (in addition to finding a violation of the suspect's person that implicated the Fourth Amendment). *Lauro v. City of New York*, 39 F. Supp. 2d 351, 363 (S.D.N.Y. 1999). The district court in *Caldarola* noted that the Second Circuit in *Lauro* did not address this alternative holding. *Caldarola*, 142 F. Supp. 2d at 438. Indeed, the Second Circuit in *Lauro* stated that it "[d]id not consider the issue of whether the videotaping of *Lauro* itself constituted a seizure of 'intangibles' as the district court suggested" because there was no need to reach this issue because of its holding that the perp walk constituted an unreasonable exacerbation of the seizure that occurred at the time of the arrest. *Lauro*, 219 F.3d at 213. The district court in *Caldarola* also noted that there were many reasons why law enforcement might have wished to videotape the transportation of the suspects and indicated that since "allegations of brutality and other improper conduct are alleged against law enforcement officials with great frequency, there is an element of self-protection in an agency's videotaping all facets of a law enforcement encounter." *Caldarola*, 142 F. Supp. 2d at 439.

²⁸¹ *See Caldarola*, 142 F. Supp. 2d at 440.

²⁸² *Id.*

Second, the court found the showing of the videotape to the press at the press conference and the distribution of copies of the videotape to the press did not violate the Fourth Amendment.²⁸³ The court concluded that the use of the tape implicated no right of privacy under the Fourth Amendment, noting that the Supreme Court in *Paul* found that dissemination of a flyer containing photographs of suspects did not implicate Fourth Amendment rights on the basis that the plaintiff in that case did not seek to suppress evidence seized during an unreasonable search.²⁸⁴ The court reasoned that the information or images shared with the press were not obtained during an unreasonable search or seizure because of the court's holding that the mere act of videotaping the arrest was not an unreasonable seizure.²⁸⁵ The court also relied on *Paul* and *Rosenberg*, cases it described as addressing the penumbral substantive right to privacy found generally in the Constitution and advanced under the Due Process Clause of the Fourteenth Amendment, and the reasoning and holdings of such cases in these contexts to reason that publicizing the videotape did not convert the filming into a Fourth Amendment violation.²⁸⁶ The court went on to distinguish *Lauro* by stating that the situation was "utterly different" than the staged perp walk in *Lauro* which the court stated "clearly implicated" the Fourth Amendment right to privacy.²⁸⁷ The court then expressly addressed the issue unresolved in *Lauro* referenced above by stating the following:

[T]his Court is willing to conclude what the Second Circuit declined to reach in *Lauro*: the State does have a legitimate interest in the accurate reporting of police activity and to that end is free to advise the press about events related to a sus-

²⁸³ See *id.* at 440-42.

²⁸⁴ See *id.* at 442.

²⁸⁵ See *id.*

²⁸⁶ See *id.* at 440-42. The court described the line of cases in the context of the penumbral right to privacy and the Fourteenth Amendment including *Paul* and *Rosenberg*, as standing for the proposition that there is no constitutionally-protected interest in being free from reputational injury alone. See *id.* at 441. The court noted that it declined "to bootstrap the making of a videotape onto otherwise legitimate arrest-related activity and thereby to create out of whole cloth an enforceable right under the Fourth Amendment where there is none under the Fourteenth." *Id.* at 443.

²⁸⁷ *Id.* at 442.

pect's arrest, processing and arraignment, including events that by their nature will rise to "photo opportunities" and Kodak moments.²⁸⁸

Finally, the court found that the press advisory and the choreographed perp walk at the courthouse did not constitute an unreasonable seizure and were not unconstitutional, reasoning that "[t]here is nothing unconstitutional about advising the press that defendants will be arraigned at a particular time and place [a]nd there is nothing unconstitutional about having press present—even by arrangement—when a defendant is legitimately taken to court"²⁸⁹ The court distinguished *Lauro* on the ground that in that case, "the entire event was fictitious and served no other purpose except to provide a film crew with the opportunity to obtain footage for the evening news."²⁹⁰ In interpreting *Lauro*, the court stated that "[t]he *Lauro* Court at least hinted, if it did not make clear, that it would not deem a warning or notification to the press to be unconstitutional."²⁹¹ The court went on to find that:

Even if the courthouse 'perp walk' could be considered a seizure for purposes of the Fourth Amendment, it did not violate [the suspects'] constitutional rights because there was a legitimate law-enforcement reason for leaving the police station and bringing [the suspects] into the . . . courthouse—namely, their arraignment.²⁹²

Furthermore, "[a]ssuming, *arguendo*, that what the police were doing outside the courthouse was waiting for the press to arrive, [the court was] not persuaded that this action unconstitutionally aggravated the legitimate seizure that occurred when [the suspects] were arrested."²⁹³ The court explained that the arrests were a newsworthy event that the press could not be kept from covering, and that the police were not constitutionally compelled to

²⁸⁸ *Id.* at 443.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* (citing *Lauro v. Charles*, 219 F.3d 202, 213 (2d Cir. 2000)).

²⁹² *Id.*

²⁹³ *Id.*

make the press's job more difficult.²⁹⁴ Therefore, the court found that the county and its officials were entitled to summary judgment with respect to a claim brought by the suspects under 28 U.S.C. § 1983 for alleged violation of the suspects' Fourth Amendment rights.

One of the suspects appealed this decision to the Second Circuit. On appeal, the suspect asserted that "the district court erred with regard to all of its legal conclusions underlying the grant of summary judgment"²⁹⁵ The Second Circuit summarized the district court's holdings as: (1) the act of videotaping the arrestees was not a seizure of intangibles and did not interfere with any possessory interests of the arrestees, (2) the choreography of the arrests did not result in the unreasonable exacerbation of the arrests, (3) the public dissemination of the videotape made by law enforcement did not implicate any privacy interests, and (4) advising the media of the arrestees impending arraignment did not implicate any constitutional rights.²⁹⁶ In *Caldarola*, the Second Circuit reached the opposite result than it did in *Lauro* and affirmed the district court's grant of summary judgment for the county and its officials on the basis that the conduct at issue did not violate the Fourth Amendment, as it occurred in the context of legitimate movement of the suspects by law enforcement.²⁹⁷

In analyzing this situation under the Fourth Amendment, the court first concluded that the county's acts of coordinating the arrests, videotaping the post-arrest walk in the parking lot, and disseminating the tape to the media all implicated the same privacy interests of the suspect.²⁹⁸ Thus, the court analyzed the constitutionality of these acts jointly.²⁹⁹

Then, the court rejected the district court's finding that the videotaping did not implicate the Fourth Amendment because there was no physical intrusion that interfered with a possessory interest of the suspects and there was no seizure within the mean-

²⁹⁴ See *id.*

²⁹⁵ *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 573 (2d Cir. 2003).

²⁹⁶ See *id.*

²⁹⁷ See *id.* at 576-77.

²⁹⁸ See *id.* at 574.

²⁹⁹ See *id.*

ing of the Fourth Amendment.³⁰⁰ Rather, the Second Circuit concluded that two types of Fourth Amendment seizures occurred here. First, the suspects were seized as a result of their lawful arrests.³⁰¹ The court noted that “[t]he manner and scope of [the] arrest—including the conduct of which [the suspect] complains—must be reasonable.”³⁰² Second, the making of the videotape resulted in the seizure of the suspects’ images, as Fourth Amendment seizures encompass the seizure of intangibles as well as tangibles, and video and sound recordings constitute seizures under Second Circuit precedent.³⁰³ Thus, the Second Circuit found that the making of the videotape constituted a seizure under the Fourth Amendment regardless of whether it is conceptualized as an exacerbation of the seizure that occurred when the suspects were arrested or as a discrete seizure.³⁰⁴

However, in contrast to the *Lauro* court, the court concluded that the suspects’ expectations of privacy were attenuated in the perp walk situation.³⁰⁵ While the court acknowledged that an accused has a privacy interest against being displayed in public wearing handcuffs and in a posture connoting guilt, it concluded that the suspect’s reasonable expectation of privacy on a public street or on department of corrections grounds is minimal because the suspect is outdoors in a place over which she has no dominion.³⁰⁶ The court distinguished the perp walk situation from the

³⁰⁰ *See id.*

³⁰¹ *See id.*

³⁰² *Id.* “[T]he Fourth Amendment’s proscription of unreasonable searches and seizures ‘not only . . . prevent[s] searches and seizures that would be unreasonable if conducted at all, but also . . . ensure[s] reasonableness in the manner and scope of searches and seizures that are carried out.’” *Id.* (quoting *Lauro v. Charles*, 219 F.3d 202, 209 (2d Cir. 2000)).

³⁰³ *See id.* at 574-75 (citing *Katz v. United States*, 389 U.S. 347, 352-53 (1967)) (holding that the recording of oral statements constituted a Fourth Amendment seizure); *Ayeni v. Mottola*, 35 F.3d 680, 684 (2d Cir. 1994), *abrogated on other grounds by* *Wilson v. Layne*, 526 U.S. 603 (1999). In *Lauro*, the Second Circuit did not reach the question of whether videotaping a perp walk constituted a seizure. 219 F.3d at 213; *see also supra* note 280.

³⁰⁴ *See Caldarola*, 343 F.3d at 575.

³⁰⁵ *See id.*

³⁰⁶ *See id.* The court rejected the suspects’ argument that their expectation of privacy was not minimal when they were led through the department of corrections parking lot because public access to this area is generally limited. *See id.* Like a public street,

media ride-along held unconstitutional by the Supreme Court in *Wilson* because the latter situation involved intrusion into the home, where an individual enjoys a very high degree of privacy protection while "[o]ne's privacy interests receive much less protection in public places."³⁰⁷ The court also noted that *Wilson* was not controlling because the Supreme Court's language indicated that its decision was based on the substantial privacy interests of a person in his home that are not present in a public place.³⁰⁸ In addition, the Second Circuit distinguished the *Lauro* court's statements concerning a suspect's material privacy interest in avoiding a perp walk by reasoning that the magnitude of the privacy interest implicated by a perp walk did not drive the court's decision that a perp walk violated the Fourth Amendment in that case.³⁰⁹ Rather, the conclusion in *Lauro* was based on the fact that there was no legitimate purpose served by the inherently fictional dramatization of an earlier prisoner transportation that occurred in that case.³¹⁰

Indeed, although the *Caldarola* court determined that the suspects' privacy interests implicated by the county's actions were minimal, the court acknowledged they still implicated the Fourth Amendment.³¹¹ Thus, a Fourth Amendment examination of the seizure required a contextualized reasonableness analysis, not just examining the reasonableness of the actual seizure per se but its scope and the manner in which it was carried out, that balanced the intrusion on the suspects' privacy against the law enforcement justification for it.³¹² Under this analysis, the court concluded that the making and release of the videotape was reasona-

the parking lot is outdoors, and the suspects had no dominion over it. *See id.* Department of corrections employees, like the suspects, were generally aware that it was their employer, and not them, who determined who would have access to the grounds. *See id.* Furthermore, the suspects could have no reasonable expectation that other county employees, including the one who made the videotape, would have been excluded from the parking lot because they were being transported through the lot while under arrest. *See id.*

³⁰⁷ *Id.* at 575-77.

³⁰⁸ *See id.* at 577.

³⁰⁹ *See id.* at 575.

³¹⁰ *See id.* at 575-76.

³¹¹ *Id.* at 576.

³¹² *See id.* at 576.

ble. The court held that the making of the videotape and its distribution to the media served the legitimate governmental purpose of informing the public about its efforts to stop criminal activity by its employees.³¹³ The court noted that the suspects' positions as public employees made the arrests more newsworthy than ordinary arrests.³¹⁴ Furthermore, the court found that the perp walks at issue here also served legitimate governmental purposes in enhancing the transparency of the criminal justice system, possibly deterring others from attempting similar crimes and informing members of the public of the arrests to enable them to come forward with information relevant to the law enforcement investigation.³¹⁵ Such purposes were not only rejected in *Lauro* and *Wilson*, but also constitute generalized law enforcement purposes, which *Lauro* and *Wilson* held insufficient to support privacy intrusions such as perp walks and media ride-alongs. However, the *Caldarola* court found these purposes valid in the situation it confronted because, unlike in *Lauro*, the videotape of the perp walk was made when the suspects were being legitimately transported pursuant to a lawful arrest.³¹⁶ The court reasoned that *Lauro* expressly did not apply to "cases in which there is a legitimate law enforcement justification for transporting a suspect," noting that the *Lauro* court found that there was no legitimate government purpose because of the staged nature of the perp walk at issue in that case, and accordingly did not foreclose the validity of these purposes in the situation at issue in *Caldarola*.³¹⁷ Furthermore, the court concluded that the fact that the county orchestrated the arrests to occur simultaneously did not alter the fact that there was a legitimate law enforcement justification for moving the sus-

³¹³ See *id.* The court also noted that protecting individuals from police abuse and protecting police from false accusations of abuse were legitimate government purposes that were implicated. See *id.* at 576 n.3.

³¹⁴ See *id.* at 576.

³¹⁵ *Id.* The court also suggested that allowing the public to view images of an arrestee can more clearly reveal a government error in detaining the wrong person than merely publicizing the arrestee's name. See *id.* This is presumably because members of the public might recognize that the wrong person was arrested.

³¹⁶ *Id.* ("The government purposes that were rejected in *Lauro* are valid in this situation because the County videotaped [the suspect] as he was being legitimately transported pursuant to a lawful arrest.").

³¹⁷ *Id.* (quoting *Lauro v. Charles*, 219 F.3d 202, 213 (2d Cir. 2000)).

pects in custody.³¹⁸ The court suggested that these purposes were sufficient to overcome the minimal expectation of privacy at play in a perp walk situation although they did not justify the infringement of the greater privacy interests of an individual in his home addressed in *Wilson*.³¹⁹ Thus, the court concluded that "[b]ecause there was a minimal expectation of privacy . . . and the conduct of the arresting officers did not unreasonably exceed the scope of what was necessary to effectuate the arrest and to otherwise serve legitimate government purposes," the government's conduct in creating and distributing the videotape was constitutional.³²⁰ The court summarized its conclusion as follows: "Although [the arrestee] possessed a privacy interest in not having his 'perp walk' broadcast to the public, that privacy interest was outweighed by . . . legitimate government purposes."³²¹ Finally, the

³¹⁸ See *id.*

³¹⁹ See *id.* at 577.

³²⁰ *Id.*

³²¹ *Id.* In finding that the making and publicization of the videotape implicated the Fourth Amendment but were not unreasonable and thus did not violate it, the Second Circuit in *Caldarola* did not address the Supreme Court's statement in *Paul* relied upon by the district court indicating that dissemination of a flyer containing photographs of suspects did not come within a zone of privacy created by the Fourth Amendment on the basis that the plaintiff in *Paul* did not seek to suppress evidence seized during an unreasonable search. See *supra* notes 202, 284 and accompanying text. It should be noted that outside of such statements, the court in *Paul* did not engage in a Fourth Amendment analysis. As expected, given that the *Paul* court indicated that an unreasonable search was not alleged, the *Paul* court analyzed no governmental actions for reasonableness or whether actions taken in connection with a search or seizure (for instance, the taking and publicization of a mug shot or photograph of an arrested (i.e., seized) suspect) were conducted in a reasonable manner, as is prescribed by cases such as *Wilson*. Given the relationship between the publicization of photographs of a suspect at issue in *Paul* and perp walks, and the publicization of a videotape of a perp walk in particular, one might argue that *Paul* supports a view (contrary to the Second Circuit's holding in *Caldarola*) that publicization of perp walks comports with the Fourth Amendment and did not implicate Fourth Amendment interests. Indeed, without relying on *Paul* for the proposition, the district court in *Caldarola* indicated that the dissemination of the videotaped perp walk was tantamount to the publicization of a mug shot, the making of which has never been classified as a seizure. *Caldarola*, 142 F. Supp. 2d at 442-43 ("[N]othing happened to [the suspect] that has not happened to thousands of criminal defendants subsequent to their arrests, when their mug shots are shown at press conferences and/or released to the press. As far as I am aware, no one has ever suggested that giving a mug shot to the local newspaper or television station transforms the taking of that photograph into a seizure."). However, this position was rejected by the Second Circuit in *Lauro*. In rejecting the argument

that the staged perp walk at issue did not implicate the Fourth Amendment, the Second Circuit in that case distinguished perp walks from mug shots by noting that in the former case, a suspect is "displayed to the world, against his will, in handcuffs and in a posture connoting guilt," while in the latter situation only facial features are exhibited. *Lauro*, 219 F.3d at 212 n.7. Indeed, the Second Circuit suggested that a mug shot does not expose anything that the suspect has not exposed to the public at large inasmuch as it depicts a suspect's face. *See id.* The court addressed this in the context of distinguishing *United States v. Dionisio*, 410 U.S. 1 (1973), a case holding that compelled production of voice exemplars to a grand jury did not infringe an interest protected by the Fourth Amendment and thus was not subject to a reasonableness requirement, which turned on the fact that the respondent had already exposed his voice to the public at large. *See Lauro*, 219 F.3d at 212 n.7. Moreover, the *Dionisio* Court distinguished *Terry*, where it was found that a "stop and frisk" of a person, where the person is physically handled in a brief search for weapons by the police while standing helpless in public, involved a search and seizure implicating Fourth Amendment rights, *Terry v. Ohio*, 392 U.S. 1, 16-19 (1967), noting that "[t]he seizure of voice exemplars does not involve the 'severe, though brief, intrusion upon cherished personal security,' effected by the 'patdown' in *Terry*—'surely . . . an annoying, frightening, and perhaps humiliating experience.'" *Dionisio*, 410 U.S. at 15 (quoting *Terry*, 392 U.S. at 24-25). Like the perp walk at issue in *Lauro*, the publicization of the videotape in *Caldarola* did not merely result in exhibition of facial features but rather displayed the suspects in handcuffs and in a posture connoting guilt, which is not the case with a mug shot. Unlike the taking and dissemination of a mug shot, a suspect's personal security is severely infringed upon by a perp walk as the suspect is handled by police, often in physical restraints. Indeed, a perp walk is a much more annoying, frightening, and humiliating experience than what occurs in the mug shot context. Furthermore, as discussed below, a perp walk is far more humiliating than merely being frisked, which was found to implicate the Fourth Amendment in *Terry*. *See infra* Part III. Accordingly, perp walks and related law enforcement conduct can be said to implicate the Fourth Amendment in ways that a mug shot or photograph does not. Thus, the language in *Paul* relied on by the district court in *Caldarola* does not cut against the applicability of the Fourth Amendment in the perp walk context and the position that certain perp walks violate the Fourth Amendment.

A counterargument is that some perp walks where a suspect is transported in custody against his will in restraints and in a posture connoting guilt necessarily comport with the Fourth Amendment, *see infra* Part III, and thus a suspect may be viewed by the public in such a condition. Indeed, some suspects may be subject to multiple legitimate perp walks during their confinement and an initial (or singular) perp walk, even one that comports with the Fourth Amendment, necessarily entails transportation of a suspect in custody in a public place and exposure to the press and public. However, unlike the exposure of one's facial features to the public, such transportation and the attendant observation and capturing of images of the suspect in such a condition occur in conjunction with a seizure and under compulsion by law enforcement and thus is not a knowing disclosure to the public. Indeed, unlike facial features depicted in a mug shot, prior to the compelled perp walk by law enforcement, the suspect has not generally knowingly disclosed images of himself in a perp walk situation to the public. *Cf. Katz v. United States*, 389 U.S. 347, 351 (1967) (indicating that "what a person knowingly discloses to the public" is not a subject of Fourth Amendment protec-

court held that it was unnecessary for a reviewing court to delve into alternative means by which the police could achieve its goal of publicizing the arrests that would provide more protection to the privacy of the suspect so long as the methods employed were constitutional.³²²

Although the Second Circuit indicated that all of the district court's legal conclusions—which included its conclusion that the advising of the media of the impending arraignment in connection with the perp walk at the courthouse was constitutional—were on appeal,³²³ the Second Circuit confined its analysis only to issues regarding the making and dissemination of the videotape of the transportation of the suspects in custody from the department of

tion but “what he seeks to preserve as private” is). Moreover, at least with respect to an initial perp walk, such an argument conflates implication of Fourth Amendment rights with reasonableness under the Fourth Amendment. With regard to the situation of a perp walk following a legitimate one as well as to an initial perp walk, as discussed above, even a legitimate perp walk occurs in conjunction with a seizure and under compulsion by law enforcement and occurs against a suspect's will and thus is not a knowing disclosure to the public. Even if one were to consider a previous legitimate perp walk (or the mere fact that an initial (or single) perp walk necessarily entails to constitute some type of knowing disclosure), this should not immunize additional displays of the suspect to the public and press in such a condition caused by law enforcement conduct unrelated to legitimate movements of the suspect (i.e., a staged perp walk) or law enforcement conduct to exacerbate the exposure of the suspect to the public and press (i.e., a choreographed perp walk or related law enforcement conduct, such as the exhibition and distribution of the videotape at issue in *Caldarola*) from the Fourth Amendment or justify them in any way. See *infra* Part III (concluding that law enforcement actions colluding with the media in choreographing perp walks as well as other acts taken in collusion or collaboration with the media in facilitating the media's observation and obtaining of images of a perp walk, such as the exhibition and distribution of a videotape of a perp walk to the press as occurred in *Caldarola* violate the Fourth Amendment). Moreover, staged and choreographed perp walks and related conduct serve to enhance the exposure of the press and public to and their ability to obtain images of the suspect in such a condition, doing further damage to the privacy interests of a suspect than legitimate perp walks without staged, choreographed, or collusive attributes. Indeed, the fact that law enforcement officers executing a warrant in *Wilson* were entitled to enter, observe, and search a private home, meaning that they were exposed to matters covered by privacy rights, did not mean that further affront to privacy rights by permitting members of the media to observe and take photographs inside the home was permitted. *Wilson v. Layne*, 526 U.S. 603, 605-06 (1999). Likewise, legitimate forced disclosure in a perp walk does not mean that unreasonable conduct exacerbating such disclosure is acceptable.

³²² See *id.*

³²³ *Id.* at 573 (“On appeal, [the appellant] asserts that the district court erred with regard to all of its legal conclusions underlying the grant of summary judgment . . .”).

corrections facility to the vehicles to take them to the police station and did not discuss the choreographed perp walk that subsequently occurred at the courthouse.³²⁴ However, the Second Circuit stated that it “affirm[ed] the district court’s grant of summary judgment in favor of the [governmental actors],”³²⁵ and the district court’s conclusion that the choreographed perp walk at the courthouse comported with the Fourth Amendment was a part of the district court’s grant of summary judgment. The Second Circuit’s opinion in *Caldarola* can be taken as approving the district court’s holding that the county’s choreography of the perp walk at the courthouse with the media, by advising the media of the time and location of the arraignment, did not run afoul of the Fourth Amendment.

Moreover, while the making and dissemination of the videotape of the transportation of a suspect in custody is slightly different from the conventional choreographed perp walk situation, it is highly similar and the Second Circuit’s analysis in the former context is applicable to the latter. In a prototypic perp walk, the suspect in custody is displayed or walked in front of the news media, usually while wearing handcuffs, so that the media has the opportunity to photograph or videotape him. In the videotaped transportation of the suspects in custody at issue in *Caldarola*, the suspects in custody were not displayed or walked in front of the media in the department of corrections parking lot as there was no media present. Rather, a county employee videotaped the suspects’ walk through the parking lot in custody, and the county showed and distributed the footage to the media. In terms of publicizing images of the transportation of the suspect in custody, this conduct serves the same ends as a perp walk. Indeed, the Second Circuit in *Caldarola* referred to the transportation of the suspects through the department of corrections parking lot that was videotaped as a perp walk.³²⁶ Likewise, the court used the term “perp walk” to describe the leading of a suspect in handcuffs by the police to the courthouse, police station, or jail regardless of whether

³²⁴ See *id.* at 574-77.

³²⁵ *Id.* at 577.

³²⁶ *Id.*

the media is physically present or not.³²⁷ In a conventional choreographed perp walk, law enforcement officers collude with the media to facilitate its observation of a suspect in custody while they are being transported for legitimate law enforcement purposes, for instance, by alerting the media of the time and place of the transportation of the suspect. In the videotape situation at issue in *Caldarola*, the county facilitated the ability of the press to obtain images of the transportation of the suspect in custody by choreographing the arrests to occur at the same time, facilitating the ability of the county to obtain videotape; the making of the videotape; the playing of the videotape for the press at the press conference; and the dissemination of copies of the tape to the press. Likewise, the county coordinated the arrests to occur at the same time, facilitating the making of the videotape. In these ways, the county's conduct paralleled a conventional choreographed perp walk.

The Second Circuit's reasoning and analysis with respect to the making and dissemination of the videotape is applicable to the context of a conventional choreographed perp walk. As the Second Circuit indicated, the suspects' reasonable expectation of privacy in the department of corrections parking lot was at least equal to that in a public street. Furthermore, the governmental purposes relied upon by the Second Circuit to support the making, exhibition, and distribution of the videotape apply to conventional choreographed perp walks. Indeed, the district court in *Caldarola* noted the newsworthiness of the suspects' arrests as a justification for the choreographed perp walk that occurred at the courthouse and, in particular, police actions to choreograph it for the benefit of the press.³²⁸ Moreover, the Second Circuit's holding that the

³²⁷ See *id.* at 572. Thus, while acknowledging the caveat raised in this discussion, this Article refers to the events concerning the videotaped transportation of suspects in custody that occurred in *Caldarola* as a perp walk notwithstanding the fact that no actual members of the media were present. Indeed, analysis relevant to that situation would apply to a situation where law enforcement officers made a videotape of a perp walk where members of the media were present and exhibited and distributed copies of it to members of the media who were not present.

³²⁸ *Caldarola v. Cnty. of Westchester*, 142 F. Supp. 2d 431, 443 (S.D.N.Y. 2001) ("Assuming, *arguendo*, that what the police were doing outside the courthouse was waiting for the press to arrive, I am not persuaded that this action unconstitutionally

making and distribution of the videotape, including the coordinated or choreographed nature of the arrests, did not run afoul of the Fourth Amendment principally turned on the fact that this government conduct occurred in the context of the legitimate transportation of a suspect pursuant to a lawful arrest. Just like the government conduct in relation to the making and distribution of the videotape at issue in *Caldarola*, a choreographed perp walk, including the element of collusion by law enforcement with the press to facilitate the media's viewing and capturing images of the suspect, occurs in the context of the legitimate transportation of a suspect in custody. Thus, the Second Circuit's opinion in *Caldarola* with respect to the making and dissemination of the videotape supports and leads to a conclusion that choreographed perp walks are constitutional. Indeed, the district court in *Caldarola* found the choreographed perp walk at the courthouse constitutional on this basis.³²⁹

Moreover, the making of the videotape, coupled with the subsequent exhibition of it and distribution of copies of it to the media, infringes on the privacy interests of the suspect to a greater extent than a conventional choreographed perp walk. In a prototypic choreographed perp walk, the press must appear at the place where the transportation of a suspect in custody occurs at the proper time, although such location and time may be provided to the press by law enforcement, to observe and capture images of the legitimate transportation of a suspect in custody. In contrast, the distribution of copies of a videotape of the transportation of a suspect in custody to the media facilitates the media's ability to obtain images of the transportation of the suspect in custody to a greater extent than a choreographed perp walk because media actors need not actually appear at the place the transportation is to occur at the proper time as they can obtain the footage at a lat-

aggravated the legitimate seizure that occurred when plaintiffs were arrested. The fact is, plaintiffs' arrest was a newsworthy event.").

³²⁹ See *id.* Indeed, in the context of finding the dissemination of the videotape constitutional, the district court used language directly applicable to the choreographed perp walk context, indicating that the government "does have a legitimate interest in the accurate reporting of police activity, and to that end is free to advise the press about events related to a suspect's arrest, processing, and arraignment, including events that . . . will rise to 'photo opportunities.'" *Id.*

er time. This makes it far easier for the media to obtain images of the transportation of the suspect and also increases the potential scope of media entities that can obtain and publicly disseminate images of the perp walk as media entities that are unable to get a reporter and/or camera crew to the place of the movement of the suspect at the appointed time are still able to obtain the footage, thus increasing the potential scope of the publicization of the images of the transportation of the suspect and the magnitude of the affront to the suspect's privacy interests.³³⁰ Accordingly, the Second Circuit's finding that the more intrusive practice of making and distributing a videotape of a perp walk comports with the Fourth Amendment, so long as the perp walk was conducted in conjunction with a legitimate movement of a suspect in custody, supports the conclusion that the less-intrusive practice of choreographing a conventional perp walk by collusion with the media is constitutional so long as the perp walk relates to the legitimate transportation of the suspect, as in a prototypic choreographed perp walk.

4. Perp Walks in the Lower Federal Courts

Thus, both the district court and the Second Circuit opinions in *Caldarola* stand for the proposition that a perp walk comports with the Fourth Amendment as long as law enforcement authorities have a legitimate purpose for transporting a suspect in public even when the police engage in conduct facilitating the media's observation of the legitimate transportation of the suspect, such as by choreographing a perp walk by colluding with the media to ensure that the media will be able to observe the legitimate movement. Lower courts addressing perp walk situations before and

³³⁰ One might argue that the making and distribution of the videotape at issue in *Caldarola* humiliated the suspect to a lesser degree than a choreographed perp walk because in the former situation, the suspect was not physically exposed to the media and did not see the media capturing images of him being transported in custody. While this might be the case, such an amelioration of the infringement on a suspect's privacy interests effected by a perp walk is small and outweighed by the increased ease that the media can obtain such images as well as the number of media entities that can obtain them, which promote more widespread publicization of them and exposure of them to large numbers of additional people, widening the scope of the public humiliation and erosion of the presumption of innocence.

after the Second Circuit decided *Caldarola*, both within and outside of the Second Circuit, have subscribed to both the same holding reached and reasoning employed by the Second Circuit in *Caldarola* in adopting this approach and developing the perp walk doctrine.³³¹ Thus, like the Second Circuit, the lower courts construe the Fourth Amendment's protections against perp walks narrowly.

Along the same lines as *Caldarola*, in *Watkins v. City of Highland Park*,³³² a federal district court in the Eastern District of Michigan concluded that as long as a law enforcement officer's conduct serves some legitimate law enforcement purpose, such as the transportation of a suspect to a courthouse for a hearing or to a police station for booking, conduct by the officer facilitating the media's viewing of the suspect in custody does not violate the Fourth Amendment.³³³ A law enforcement officer has no affirma-

³³¹ See *Gibbons v. Lambert*, 358 F. Supp. 2d 1048, 1071-73 (D. Utah 2005) (holding that a non-staged perp walk does not violate the Fourth Amendment as the media observes the defendant from a public place in the context of a perp walk appearing to contain choreographed elements); *Watkins v. City of Highland Park*, 232 F. Supp. 2d 744, 757-61 (E.D. Mich. 2002) (holding that a perp walk "is not unconstitutional so long as it serves some legitimate law enforcement's purpose [such as when the suspect is] filmed while being transported to the police station"); *Otero v. Town of Southampton*, 194 F. Supp. 2d 167, 181 (E.D.N.Y. 2002) (holding that a perp walk does not violate the Fourth Amendment as long as it is not staged and the transportation of a suspect serves a legitimate law enforcement purpose); see also *Conrad v. NBC Universal, Inc.*, 536 F. Supp. 2d 380, 392 (S.D.N.Y. 2008) (extending the analysis employed by the Second Circuit in *Caldarola* beyond the perp walk context to find that police conduct in the execution of arrest and search warrants that had no legitimate law enforcement purpose for the benefit of media present for and filming the execution of the warrants was unconstitutional); *OPW Fueling Components v. Works*, 2007 U.S. Dist. LEXIS 34083, at *34-41 (S.D. Ohio 2007) (extending the analysis employed by the Second Circuit in *Caldarola* beyond the perp walk context to the related situation where a suspect is arrested at his workplace and is subsequently transported in custody in front of his coworkers); cf. *Arthur v. Goord*, 2008 U.S. Dist. LEXIS 12841, at *15-16 (S.D.N.Y. 2008) (indicating that a perp walk where the "suspect is photographed in the normal course of being moved from one place to another by the police" was not rendered unconstitutional by *Lauro* and distinguishing this situation from that of staged perp walk in rejecting a habeas petitioner's claim that his statements to police should have been suppressed because a perp walk had occurred on the basis that a perp walk is not the functional equivalent of interrogation (quoting *Lauro v. Charles*, 219 F.3d 202, 213 (2d Cir. 2000))).

³³² 232 F. Supp. 2d 744 (E.D. Mich. 2002).

³³³ *Id.* at 760. The court in *Watkins* noted that there was no evidence that the perp walk at issue was even choreographed. See *id.* However, the court's reasoning would

tive duty to hinder the media's viewing of a suspect in custody while being transported for legitimate purposes.³³⁴ For instance, if an officer has the option of escorting a suspect in custody out of multiple entrances to the building, she need not elect the one that is more difficult for the media to gain access to and may purposely choose to take the suspect through an entrance where she knows the media is present.³³⁵ The district court reasoned that the Fourth Amendment does not require reviewing courts to scrutinize the transportation of a suspect in custody to ensure that it is performed in the least intrusive manner but rather that the transportation be performed in a reasonable fashion.³³⁶

Following this reasoning, the district court in *Watkins* also addressed the condition in which the suspect is paraded in front of the media. The court held that a perp walk is not unreasonable because a defendant in custody is escorted in front of the media handcuffed, as handcuffing suspects in custody is a routine police practice which serves legitimate government purposes in preventing escape and protecting the safety of the officer.³³⁷

In addition, the lower courts have suggested that non-staged perp walks are more legitimate in cases involving certain types of crimes than others. In *Gibbons v. Lambert*,³³⁸ a district court in the District of Utah found a non-staged perp walk appearing to

encompass a choreographed perp walk, especially given that the court cited the district court opinion in *Caldarola* holding a choreographed perp walk constitutional with approval. Furthermore, contrary to the court's conclusion, the perp walk was certainly characterized by elements of choreography, given that law enforcement officers invited the media to a "pre-raid briefing" and gave media representatives permission to accompany them on the raid where the arrest was made although the media was not permitted to enter the building. *Id.* at 749, 760.

³³⁴ See *id.* at 760.

³³⁵ See *id.*

³³⁶ See *id.*

³³⁷ See *id.* This categorical rule permitting handcuffing of suspects in custody is necessary for the protection of police officers. A rule requiring officers to make on-the-spot judgments about whether it is reasonable to handcuff a given suspect is error-prone given the difficulty in assessment of the dangerousness or flight risk of a given suspect. Failure to restrain a suspect in custody can lead to disastrous consequences. See, e.g., *Bowen v. State*, 791 So. 2d 44, 48-49 (Fla. Dist. Ct. App. 2001) (describing a situation where police officers, unaware of a suspect's dangerousness or criminal history, failed to restrain him appropriately during transportation allowing the suspect to escape, killing the officers in the progress).

³³⁸ 358 F. Supp. 2d 1048 (D. Utah 2005).

contain choreographed elements to comport with the Fourth Amendment. A police officer called a member of the media and informed him that a search warrant had been executed in the town where the suspect's house, from which he was later escorted during the perp walk at issue, was located. Furthermore, the suspect testified that before he was escorted from his house to a waiting police vehicle, he overheard someone say that the officers needed to wait for "them," presumably the media, to set up.³³⁹ The court suggested that the government had especially strong reasons to conduct a perp walk for a suspect charged with distributing drugs to young women because of the seriousness of the allegations, the involvement of minors, and because many potential victims of such a crime are unknown.³⁴⁰ Thus, there was a legitimate law enforcement purpose for this perp walk and broadcast of the defendant's face because it gave notice to potential victims that the suspect was being investigated and that they should come forward.³⁴¹ This reasoning suggests that perp walks are more appropriate for criminal activity which potentially can reach a vast universe of unknown victims who could potentially lead to the identification of additional criminal acts as opposed to various white-collar offenses such as securities fraud, which do not directly affect discrete victims. Finally, the district court suggested that the perp walk served to make it known that law enforcement was combating the "rave" scene—a culture involving parties where young people consume a variety of illegal drugs—in an effort to inform the public of the problem concerning the rave scene, deter rave organizers, and deter young people from participating in the rave scene.³⁴² Although similar justifications were held insufficient to warrant invasions of Fourth Amendment privacy in *Wilson* and *Lauro*, the court in *Gibbons* distinguished these cases by noting that *Wilson* involved invasion of privacy in the home, which is more intrusive than a perp walk, and *Lauro* involved a staged perp walk entailing a higher level of intrusiveness.³⁴³ Thus, given

³³⁹ *Id.* at 1058.

³⁴⁰ *Id.* at 1072.

³⁴¹ *See id.*

³⁴² *See id.*

³⁴³ *See id.*

the heightened law enforcement interest in the perp walk in this case and that the perp walk was not staged, the court held that the level of intrusiveness that occurred in the non-staged perp walk containing choreographed elements was reasonable under the Fourth Amendment.³⁴⁴

At least one federal district court has demonstrated even more hostility toward Fourth Amendment protection against perp walks in dicta than the perp walk doctrine developed by the Second Circuit. Although the district court in *Watkins* considered a non-staged perp walk and resolved the case on this ground in a manner consistent with the Second Circuit's general approach, it questioned the Second Circuit's conclusion in *Lauro* that a staged perp walk violated the Fourth Amendment.³⁴⁵ The district court indicated that *Lauro* depended on an expansive reading of *Wilson*, as the media ride-along situation in that case involved an invasion of the suspect's home by the media, unlike a perp walk, and this fact weighed heavily in the *Wilson* Court's analysis.³⁴⁶ However,

³⁴⁴ See *id.* at 1072-73. In addition to finding that the choreographed perp walk at issue was reasonable under the Fourth Amendment, the district court in *Gibbons* alternatively held that the perp walk did not implicate any Fourth Amendment privacy interests since there was no delay in the arrest and the media observed it from a public place. *Id.* at 1072. This is contrary to the Second Circuit's holding in *Caldarola* that the making and distributing of the videotape to the media of a perp walk "implicate[d] privacy interests that are protected by the Fourth Amendment" since "an accused possesses a privacy interest in not being 'displayed to the world, against his will, in handcuffs, and in a posture connoting guilt.'" 343 F.3d 570, 575 (2d Cir. 2000) (quoting *Lauro v. Charles*, 219 F.3d 202, 211, 212 & n.7). The Second Circuit's reasoning supporting this conclusion is in no way undercut by the fact that a perp walk occurs in a public place or is of a short duration. Indeed, in *Caldarola*, the Second Circuit recognized that Fourth Amendment privacy interests are implicated by a perp walk on a public street, although such interests are minimal. See *id.* at 575-76. Moreover, the position taken by the *Gibbons* court is inconsistent with Supreme Court precedent indicating that "the Fourth Amendment protects people, not places," *Katz v. United States*, 389 U.S. 347, 351 (1967), and that a "'stop' and 'frisk'" conducted in public constitutes a significant intrusion on interests protected by the Fourth Amendment. See *Terry v. Ohio*, 392 U.S. 1, 16-17 (1968); see also *infra* note 401 and accompanying text.

³⁴⁵ *Watkins v. City of Highland Park*, 232 F. Supp. 2d 744, 758 & n.11 (E.D. Mich. 2002); see also *United States v. Edelin*, 76 F. Supp. 2d 1, 4 (D.D.C. 1999) (suggesting that the district court's decision in *Lauro* that the perp walk at issue violated the Fourth Amendment was wrongly decided, especially in light of the Supreme Court's subsequent decision in *Wilson*).

³⁴⁶ See *Watkins*, 232 F. Supp. 2d at 758 & n.11; see also *Edelin*, 76 F. Supp. 2d at 4 (suggesting that the district court opinion in *Lauro* finding that the perp walk at issue

the district court expressly decided not to resolve the issue of whether it would follow *Lauro* in a staged perp walk case as doing so was unnecessary to resolve the case before it.³⁴⁷

III. CHOREOGRAPHED PERP WALKS AND RELATED LAW ENFORCEMENT CONDUCT DO NOT COMPORT WITH THE FOURTH AMENDMENT

As described above, the Second Circuit and other courts confine *Lauro* to its facts in balancing the suspect's Fourth Amendment privacy rights against the law enforcement interests implicated by a given perp walk. A perp walk occurring in a public space may constitute a violation of the suspect's Fourth Amendment rights if it advances no specific, legitimate, governmental objectives. Generalized law enforcement purposes, such as providing the public with a view of police business and deterring police abuses, are not sufficient alone to justify a perp walk.³⁴⁸ Thus, a completely staged perp walk, where a suspect is moved only to advance such purposes, violates the Fourth Amendment. However, in balancing Fourth Amendment and governmental interests, courts hold that a particularized legitimate objective advanced by the perp walk, that is legitimately moving the suspect, justifies the entire perp walk regardless of whether individual actions taken by law enforcement officials in executing the movement of the suspect in custody were necessary to advance the legitimate interests that justify the movement itself. This Part analyzes this approach turning on the legitimacy of the purpose of the movement itself in terms of the Supreme Court's Fourth Amendment jurisprudence. This Part concludes that such an approach, like the one taken by the Second Circuit in *Caldarola*, neglects to properly consider the reasonableness of the manner in which the movement is carried out and is contrary to Supreme Court precedent. This

violated the Fourth Amendment was not good law after *Wilson* because *Wilson* was largely based on the "overriding respect for the sanctity of the home" and "perp walks" do not raise the same concerns regarding the home" (quoting *Wilson v. Layne*, 526 U.S. 603, 610 (1999)).

³⁴⁷ See *Watkins*, 232 F. Supp. 2d at 758 n.11.

³⁴⁸ See *Lauro v. Charles*, 219 F.3d 202, 212-13 (2d Cir. 2000); Kaiser, *supra* note 3, at 1224.

Part also concludes that the justifications for law enforcement actions taken to assist the obtaining of images of perp walks by the press advanced by the government and accepted by the Second Circuit in *Caldarola* to support the making of a videotape of a perp walk by law enforcement and its exhibition and distribution to the press by law enforcement are inadequate and, accordingly, that choreographed perp walks and related law enforcement conduct and collusion with the press to facilitate the capture of images of the legitimate transportation of a suspect in custody by the press constitute an unreasonable manner in carrying out the arrest, detention, and movement of the suspect.

A. The Second Circuit's Holdings and Reasoning in Lauro and Caldarola are Inconsistent and Cannot Be Reconciled in a Manner Consistent With Supreme Court Precedent.

In *Caldarola*, the Second Circuit held that the making, distribution, and exhibition to the media of a videotape of the transportation of suspects in custody, a perp walk situation very similar to a choreographed perp walk, comported with the Fourth Amendment because there was a legitimate law enforcement justification for transporting the suspect in custody.³⁴⁹ The Second Circuit reasoned that the justifications it found insufficient in concluding that a wholly staged perp walk was unreasonable in *Lauro*—(1) that law enforcement officers should have discretion to decide when it would further the mission of law enforcement to allow media presence; (2) that accurate reporting of law enforcement activities (or informing the public about them) was a significant interest; and (3) that the presence of the media at a perp walk could deter law enforcement abuses—“[we]re valid in this situation because . . . [the suspect was] legitimately transported pursuant to a lawful arrest.”³⁵⁰ This reasoning distinguishing staged perp walks from perp walk situations involving legitimate movements of suspects in custody, such as choreographed perp

³⁴⁹ *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 576 (2d Cir. 2003) (“The government purposes that were rejected in *Lauro* are valid in this situation because . . . [the suspect] was being legitimately transported pursuant to a lawful arrest.”).

³⁵⁰ *Id.*; see also *Lauro*, 219 F.3d at 212-13.

walks or the making, exhibition, and distribution of the videotape of the perp walk in *Caldarola*, is specious, and the court did not explain or elaborate on this statement. These justifications for a perp walk are largely independent of the legitimacy of the movement of the suspect and apply when the suspect is moved for legitimate and illegitimate purposes.³⁵¹ Also, a choreographed perp

³⁵¹ A possible counterargument with respect to the justification pertaining to the accurate reporting of law enforcement activities might be based on the Second Circuit's statement in *Lauro* that even assuming that there was a legitimate state interest in accurate reporting of police activity, that interest was not well served by a staged perp walk constituting an inherently fictional representation of the actual movement of the suspect. 219 F.3d at 213. In contrast, there is nothing fictional about the movement of the suspect in the context of a choreographed perp walk or related situations, such as the one at issue in *Caldarola*. Thus, one might argue that a choreographed perp walk, or other perp walk situation involving the legitimate transportation of a suspect, implicates a government interest in accurate reporting on and informing the public of law enforcement activities while a staged perp walk does not, or at least does so to a lesser degree. However, such an argument overlooks the fact that although a staged perp walk does not entail an actual legitimate movement of the suspect (and thus does not accurately inform the public about such a movement), even a staged perp walk can promote an interest in accurate reporting of police activity for reasons including that a staged perp walk reveals the fact of an arrest and the identity of the suspect to the public. Indeed, the Second Circuit in *Caldarola* indicated that informing the public of the mere fact that an arrest occurred was a legitimate government purpose supporting the legitimacy of the government conduct facilitating exposure of images of the transportation of suspects in custody at issue inasmuch as it approvingly cited the public interest in and newsworthiness of the fact that public employees were arrested on suspicion of grand larceny and noted that divulging of the arrests enhances the transparency of the criminal justice system and may deter others from committing similar crimes. 343 F.3d at 576. The court further indicated that "allowing the public to view images of an arrestee informs and enables members of the public who may come forward with additional information relevant to the law enforcement investigation." *Id.* Because a staged perp walk shows the public that an arrest has occurred and the identity of the individual arrested, it furthers these purposes for a perp walk to the same extent as a choreographed perp walk. Indeed, a staged perp walk is only fictional with respect to the extent it fails to accurately inform the public about a legitimate movement of the suspect. As the legitimate movement of a suspect is a law enforcement activity, one might argue that a fictitious recreation of it takes away from the accurate reporting of law enforcement activities as a whole. However, any such effect is minimal given that the accuracy of reporting on a movement of a suspect itself is not required to serve the purposes for reporting on perp walks discussed above. Indeed, the *Caldarola* court did not advance informing the public about the movement of the suspect itself as a purpose to be served by perp walks or any purposes directly turning on it. Moreover, in summarily concluding that the government purposes rejected in *Lauro* were valid in *Caldarola* because the videotaped perp walk occurred in the context of the legitimate transportation of the suspect, the Second Circuit did not attempt to distinguish the

walk and related law enforcement conduct in collaboration with the media to facilitate the media's observation of a legitimate transportation of a suspect, such as the making, exhibition, and distribution of a videotape of a perp walk at issue in *Caldarola*, do not do less violence to a suspect's privacy or humiliate him less than a staged one.³⁵² Furthermore, the *Lauro* court pointed to

perp walk situation at issue (where the government facilitated the viewing and obtaining of images of the legitimate transportation of a suspect) from staged perp walks on the basis that the former more effectively promoted the goal of accurately informing the public about law enforcement activities or reference such an argument (although in an earlier section of the opinion summarizing *Lauro*, it noted the statement in *Lauro* referenced above). Thus, such a distinction does not appear to be the basis for the Second Circuit's apparent divergent treatment of this justification in *Lauro* and *Caldarola*.

It is beyond peradventure that the deterrence of law enforcement abuses by the presence of the media is equally served by both choreographed and staged perp walks as the media is able to observe the suspect and his condition in either case. Likewise, to the extent that exposure of images of a suspect in custody to the public generally furthers the law enforcement mission, this is the case for both choreographed and staged perp walks.

³⁵² Regardless of whether a perp walk is conducted in connection with a legitimate movement of a suspect or is a wholly staged event, it has the same effect in terms of affront to privacy and humiliation. Both choreographed and staged perp walks (as well as related conduct, such as the exhibition and distribution of the videotape at issue in *Caldarola*) exacerbate the humiliation suffered by the suspect and the affront to privacy interests implicated by perp walks, including the erosion of the presumption of innocence, by the facilitation of the observation and capturing of images of the perp walk and the attendant increased exposure of the perp walk to the media, leading to increased publicization of the event. Indeed, staged and choreographed perp walks, as well as related conduct, such as the exhibition and distribution of the videotape at issue in *Caldarola*, all function to increase the humiliation and affront to privacy effected by a perp walk by increasing the number of media members exposed to the perp walk because they permit media representatives that would not have been present at an unchoreographed perp walk to observe and obtain images of the perp walk. One might argue that a staged perp walk might be more humiliating than a choreographed perp walk because it involves a second perp walk in addition to one conducted for legitimate purposes in front of media members who could not observe the legitimate transportation, but a choreographed perp walk is a single perp walk before additional media members that would not have been present but for law enforcement collusion, making the event itself more humiliating and raucus than an unchoreographed transportation of a suspect, which might also be considered more humiliating than two separate walks before smaller numbers of media members that might be less obvious or intrusive to the suspect. Likewise, conduct related to a choreographed perp walk, such as the exhibition and distribution of a perp walk videotape to the media, could very well lead to greater humiliation and violence to the suspect's privacy interests than a staged perp

reasoning to reject these justifications in the staged perp walk context—that they were generalized law enforcement objectives insufficient to trump the Fourth Amendment—that is independent of the legitimacy of the transportation of the suspect at issue.³⁵³ Thus, as the Second Circuit considered these justifications for a perp walk legitimate and concluded that they outweigh the privacy interests implicated in the perp walk context in *Caldarola*, one might argue that the reasoning of the *Caldarola* court suggests that *Lauro* was incorrectly decided and that perp walks should always be constitutional under the Fourth Amendment even if they are wholly staged. This is a conclusion that the Second Circuit was not prepared to draw in *Caldarola*. This wrinkle suggests that either the Second Circuit was not merely creating a categorical rule based on differences in the applicability of the justifications for perp walks dependent on the legitimacy of the movement of the suspect in custody, such as between the staged and choreographed contexts, or that either *Caldarola* or *Lauro* was wrongly decided.

However, it is possible to distinguish perp walks involving legitimate transportations of suspects in custody and those that are not, such as choreographed and staged perp walks respectively, and reconcile *Caldarola* and *Lauro* by viewing the statements discussed above in *Caldarola* in the context of a balancing test.³⁵⁴

walk given that the tape could be distributed to media entities that would not have attended a staged perp walk, as discussed above.

³⁵³ 219 F.3d at 212-13 (quoting *Wilson v. Layne*, 526 U.S. 603, 612 (1999)). For further discussion in the context of the second justification, the need for accurate reporting of police activity, see *supra* note 351. Likewise, as discussed below, the *Lauro* court's extension of the Supreme Court's reasoning in *Wilson* that the need for accurate reporting on police activities had no direct relation to the lawful arrest in the home at issue in that case to the staged perp walk context is also applicable in the context of choreographed perp walks and other conduct involving collusion or collaboration by law enforcement with the media to facilitate the media's observation and acquisition of images of a perp walk. *See id.*

³⁵⁴ Indeed, such a balancing test is consistent with the Supreme Court's approach to determining the reasonableness of a search or seizure involving examining all of the circumstances and weighing the nature and scope of the intrusion against the government's justifications for it. *See supra* note 210 and accompanying text. Consistent with this analysis, a district court has stated that "[t]he reasonableness of an asserted interest in privacy is determined by the totality of the circumstances" in the perp walk context. *Vargas v. Davila*, 2009 U.S. Dist. LEXIS 13833, at *20 (D.P.R. 2009).

The *Caldarola* court's language that the justifications discussed above are "valid" in the context of a perp walk involving a legitimate movement of a suspect (e.g., a choreographed perp walk or the making, exhibition, and distribution of the videotape of a perp walk at issue in *Caldarola*) but not the staged perp walk context does not explicitly evoke a balancing test and suggests that the categorical validity of these justifications turns on whether a perp walk involves the legitimate transportation of the suspect or not (i.e., is staged or choreographed).³⁵⁵ However, this language can

³⁵⁵ *Caldarola*, 343 F.3d at 576-77. Another possible argument to distinguish *Lauro* and *Caldarola* (and thus the staged and choreographed perp walk contexts) is based on the *Lauro* court's statement that even assuming that there was a legitimate state interest in accurate reporting of police activity, that interest was not well served by a staged perp walk constituting an inherently fictional representation of the actual movement of the suspect. 219 F.3d at 213. In contrast, the movement of the suspect in the context of a choreographed perp walk, or related context involving the legitimate transportation of a suspect, is not fictional. Thus, one might argue that a choreographed perp walk or related perp walk situation involving the legitimate transportation of a suspect implicates a government interest in accurate reporting on and informing the public of law enforcement activities while a staged perp walk does not. While the *Caldarola* court did not expressly rely on this language in its attempt to distinguish *Lauro*, it might be taken to have hinted at such an argument inasmuch as it stated that the *Lauro* court found that there was no legitimate government purpose for a staged perp walk because of its staged nature and noted this language in an earlier section of the opinion summarizing *Lauro*. *Caldarola*, 343 F.3d at 573, 576. However, any attempt to distinguish *Lauro* and *Caldarola* on this basis fails. *Lauro* did not hold that accurate reporting of police activity was a legitimate state interest capable of supporting any type of perp walk. Rather, the *Lauro* court found that the Supreme Court explicitly rejected such an argument in the media ride-along context in *Wilson* and indicated that the need for accurate reporting on police issues had no direct relation to the lawful arrest in the home at issue in that case and extending this reasoning to the staged perp walk context based on a quotation from *Wilson*. *Lauro*, 213 F.3d at 213 (quoting *Wilson*, 526 U.S. at 612-13). As *Wilson* did not implicate any sort of fictional dramatization, the Supreme Court's finding that the accurate reporting of law enforcement activities was not sufficient to overcome Fourth Amendment rights in that case is generally applicable and not restricted to situations where this interest is not fully served due to a fictitious aspect of the reporting. The *Lauro* court's extension of the reasoning in *Wilson* to the staged perp walk context thus did not and could not have turned on the fictional nature of a staged perp walk. Indeed, relying on *Wilson*, the *Lauro* court noted that accurate reporting on law enforcement activities was a generalized law enforcement objective that was not sufficient to trump Fourth Amendment rights. *See id.* This statement indicates that the *Lauro* court considered such a justification insufficient to trump the Fourth Amendment as a general matter and is not context-dependent. Thus, this reasoning indicates that the *Lauro* court did not find such a justification insufficient to support a staged perp walk because of the staged and fictitious nature of such a perp walk. Indeed, on its face, this reasoning

be interpreted to indicate that the justifications rejected in *Lauro* are not sufficient in themselves to support a perp walk in the absence of other legitimate purposes and thus that staged perp walks are unreasonable because they serve no other legitimate government purpose. Conversely, under such an interpretation, these justifications, together with a legitimate governmental purpose in effecting the movement of the suspect, as is the case in the choreographed perp walk situation, are sufficient to render a perp walk reasonable. This interpretation is consistent with the Fourth Amendment balancing of governmental interests served by perp walks with the suspect's privacy that the Second Circuit purport-

indicates that such a justification is insufficient to support both staged and choreographed perp walks (as well as other collusive conduct by law enforcement with the media in promoting the media's observation and acquisition of images of a perp walk, such that the conduct surrounding the videotape in *Caldarola*). In holding that the staged perp walk at issue violated the Fourth Amendment, the *Lauro* court also relied on the finding that the perp walk was unrelated to the object of the arrest, reasoning that has nothing to do with the fictitious nature of a staged perp walk and is equally applicable to police conduct in choreographing a perp walk or otherwise collaborating with the press to facilitate the press's observation and acquisition of images of the legitimate transportation of a suspect in custody. Indeed, as discussed below, the need for accurate reporting on police issues is unrelated to any legitimate justification for the transportation of a suspect in custody. This is the case for a choreographed perp walk and other conduct involving collusion or collaboration by law enforcement with the media to facilitate the media's observation and acquisition of images of a perp walk. Finally, it should be noted that that the *Lauro* court only raised the issue of the fictitious nature of staged perp walks in the context of a hypothetical alternative where accurate reporting on police activity was considered a legitimate state interest presumably capable of trumping the Fourth Amendment (a proposition rejected in *Wilson* given the lack of relation of such an interest with the purposes of a search or seizure). Even if this were the case, the court did not find that a staged perp walk definitively could not promote such an interest; it merely concluded that the interest in accurate reporting of police activity was not well served in the staged perp walk context. Indeed, as discussed above, although a staged perp walk does not entail an actual legitimate movement of the suspect (and thus does not inform the public about such a movement), even a staged perp walk can promote an interest in accurate reporting of police activity for reasons including that a staged perp walk reveals the fact of an arrest and the identity of the suspect to the public, which are primary purposes advanced for perp walks involving collusion between law enforcement and the press related to legitimate transportation of the suspect. See *supra* notes 251-63. In contrast, the *Caldarola* court did not advance informing the public specifically of legitimate movements of a suspect as a purpose for the law enforcement conduct at issue, suggesting that any argument for distinguishing *Caldarola* and *Lauro* on this basis is insignificant at best.

ed to engage in *Caldarola*³⁵⁶ and would explain its divergent treatment of perp walks related to legitimate transportations of suspects in custody and staged perp walks divorced from any legitimate movement of a suspect.³⁵⁷

³⁵⁶ Likewise, at least one district court also appears to have followed a balancing approach in the choreographed perp walk context and concluded that the “several legitimate law enforcement purposes [that] were served by having the media present to witness [the legitimate movement of the suspect]” outweighed the suspect’s privacy interests (which the court considered to be intruded upon to a lesser extent than the privacy interests of the arrestee in *Lauro*) and thus justified a perp walk with choreographed elements. *Gibbons v. Lambert*, 358 F. Supp. 2d 1048, 1072 (D. Utah 2005).

³⁵⁷ The Second Circuit’s approach in *Caldarola* is not merely a simplistic rule that the means by which a reasonable transportation of a suspect in custody, such as to a court appearance, is carried out are reasonable per se. Rather, the Second Circuit weighs the governmental interests served by a perp walk against the suspect’s privacy interest under the Fourth Amendment. In *Lauro*, the Second Circuit held that these interests were insufficient to justify a perp walk when there was no legitimate reason to transport the suspect. In *Caldarola*, the Second Circuit held that these interests were “valid” when there was a legitimate reason to transport the suspect. However, as discussed above, these interests are largely implicated to the same degree regardless of the existence of another legitimate reason to transport the suspect. *See, e.g., supra* note 321 and accompanying text. Thus, the court’s language that the presence of such an additional reason renders the interests “valid” can likely be taken to mean that when coupled with such a reason, these interests are sufficient to overcome the suspect’s privacy rights but are insufficient on their own. When a reason for the transportation is present, the interests are “valid” in the sense that they are sufficient to justify the perp walk when combined with a legitimate reason for the suspect’s transportation. The fact that the Second Circuit appeared to endorse balancing in *Lauro* inasmuch as it relied on *Wilson* to find that generalized justifications did not outweigh Fourth Amendment rights and did not merely dismiss these justifications as inapplicable, *see supra* notes 252-60 and accompanying text, as well as in *Caldarola* strongly supports this interpretation. Therefore, under such a view of the Second Circuit’s approach, the justifications for the transportation of the suspect together with the justifications for conducting it in a manner which exacerbates exposure to the press both figure in to analysis of the reasonableness of the transportation and are weighed in the aggregate against the suspect’s privacy interests. Although *Caldarola* did not expressly address the issue, the fact that the court considered the governmental interests served by exposure of a suspect in custody to the press suggests that the Second Circuit does not consider the legitimacy of the transportation sufficient to justify exposure of the suspect to the press, but considers the aggregate of legitimate transportation and the governmental interest in exposing the suspect to the press sufficient to do so. Moreover, some language in *Caldarola* might be taken to support such aggregation in balancing government purposes with Fourth Amendment interests. The court found that “the conduct of the arresting officers did not unreasonably exceed the scope of what was necessary to effectuate the arrest and to otherwise serve legitimate government purposes” and summarized its conclusion by stating that the suspect’s “privacy interest was outweighed by . . . legitimate government purposes.” *Caldarola*, 343 F.3d at 577.

While this argument based on a balancing approach has merit, it is inconsistent with the Supreme Court's approach to evaluating whether a reasonable search or seizure was affected in a reasonable manner. The Supreme Court requires law enforcement officers to conduct searches and seizures that are reasonable in themselves in a reasonable manner.³⁵⁸ Indeed, the Court has expressly rejected the proposition that the Fourth Amendment requirement that a seizure be reasonable only applies to the reasonableness of the search or seizure itself and does not limit how that seizure is made.³⁵⁹ In evaluating the reasonableness of the manner in which a search or seizure is conducted, the Court does not aggregate justifications for the reasonableness of the search or seizure itself and the reasonableness of the means employed by law enforcement officers in effecting it.³⁶⁰ Rather, the Court separates the reasonableness of the search or seizure itself and the individual events that comprise the manner in which it is executed. For instance, in *Wilson*, the Court did not consider the obvious reasonableness of the arrest pursuant to a valid arrest warrant in evaluating the reasonableness of the manner in which the search was conducted much less use the reasonableness of the seizure as a whole to justify the manner in which it was carried out.³⁶¹ Rather, the *Wilson* Court conducted a separate inquiry as to the reasonableness of the presence of the media when the arrest warrant

While it is not entirely clear if the latter statement refers to the purposes advanced for a perp walk related to publicity or those purposes in aggregation with the legitimacy of the movement of the suspect, the court's use of the term "otherwise" in the former statement suggests that it considered the legitimate movement of the suspect a legitimate government purpose and that the latter statement referring merely to legitimate government purposes encompassed this purpose as well as others.

³⁵⁸ See *supra* notes 211-14 and accompanying text.

³⁵⁹ See *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985). Indeed, the *Caldarola* court expressly acknowledged this rule. 343 F.3d at 574 ("The Fourth Amendment's proscription of unreasonable searches and seizures not only . . . prevent[s] searches and seizures that would be unreasonable if conducted at all, but also . . . ensure[s] reasonableness in the manner and scope of searches and seizures that are carried out." (quoting *Lauro*, 219 F.3d at 209) (internal quotation marks omitted)).

³⁶⁰ See *Wilson v. Layne*, 526 U.S. 603, 611, 614 (1999) (holding that the execution of an obviously reasonable seizure authorized by warrant was unreasonable and violated the Fourth Amendment because it was unreasonable for the police to allow the media to accompany them while they entered the suspect's home to effect the arrest).

³⁶¹ 526 U.S. at 611-14.

was executed at the suspect's home and concluded it was unreasonable.³⁶² The reasonableness of and justifications for the original search and seizure played no role in this analysis. However, the Supreme Court does not consider the way in which a search or seizure may reasonably be carried out entirely divorced from the justifications for the original search or seizure. Indeed, the Court requires that police action in carrying out a lawful seizure be related to the justifications of the lawful intrusion on the suspect's privacy rights to constitute a reasonable means of effecting a seizure.³⁶³ Furthermore, in assessing the reasonableness of the means in which a seizure is accomplished, the Court examines the reasonableness of individual discrete law enforcement actions in determining if a seizure was reasonable rather than only examining the aggregate reasonableness of the way in which law enforcement carried out the seizure.³⁶⁴ Accordingly, any interpretation of *Caldarola* that looks to aggregation of the legitimacy of the movement of a suspect with justifications advanced for the manner in which it carried out facilitating media exposure, such as the balancing approach set forth above, to support the constitutionality of the manner in which the movement was carried out is inconsistent with Supreme Court precedent.

B. Choreographed Perp Walks and Related Law Enforcement Conduct to Facilitate the Ability of the Press to Obtain Images of Legitimate Perp Walks Are Unconstitutional Under the Supreme Court's Fourth Amendment Jurisprudence.

Moreover, apart from any attempt to reconcile the Second Circuit's holdings in *Caldarola* and *Lauro*, given the above, the approach taken by the Second Circuit in *Caldarola* as well as by district courts, under which the legitimacy of the movement of a suspect leads to the reasonableness of a perp walk, is inconsistent with *Wilson* and the framework under which the Court analyzes

³⁶² *Id.*

³⁶³ See *supra* note 214 and accompanying text.

³⁶⁴ See *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)) (suggesting that a court evaluating the reasonableness of the way in which a seizure was carried out may evaluate the reasonableness of "every push or shove").

the reasonableness of the means by which law enforcement carries out a seizure. By making the reasonableness of a perp walk turn on the legitimacy of the justification for moving a suspect in the first place, the Second Circuit and district courts inappropriately considered the legitimacy or reasonableness of the transportation of the suspect itself in determining if the way in which it was carried out was reasonable.³⁶⁵ If the *Caldarola* approach had been employed in *Wilson*, the legitimate reasons for the arrest would have been aggregated with the justifications for the media ride-along or would have at least played a role in analyzing whether the ride-along was reasonable. The *Wilson* Court concluded that there was not "any reason" related to the execution of the arrest warrant to include reporters and thus that the arrest was executed in an unreasonable manner at the same time it indicated that the entrance of the officers into a home to execute an arrest warrant was unquestionably reasonable.³⁶⁶ The "any reason" language indicates that the Court, consistent with its prior precedents, did not figure the fact that the execution of the arrest warrant was legitimate into its analysis of the reasonableness in the way it was carried out.

As applied to perp walks, the Supreme Court's analysis of the reasonableness of the way in which a seizure is conducted leads to the conclusion that the fact that a prisoner is moved legitimately does not legitimate the choreography of a perp walk or related law enforcement conduct in collusion or collaboration with the media in facilitating the media's observation and obtaining of images of a perp walk, such as the actions surrounding the videotape at issue in *Caldarola*. In all of the perp walk cases faced by the lower courts, including *Lauro* and *Caldarola*, the initial arrest or underlying seizure unquestionably comported with the Fourth Amend-

³⁶⁵ This is the case regardless of whether the Second Circuit's divergent holdings in the context of perp walks related to the legitimate transportation of a suspect, such as a choreographed perp walk or the making, exhibition, and distribution of the videotape at issue in *Caldarola*, and those that are not, such as staged perp walks, are explained as differential applicability of the justifications for exposing a suspect in custody to the press based on the legitimacy of the movement of the suspect or as an application of a balancing test.

³⁶⁶ 526 U.S. at 611 ("The reporters . . . were not present for any reason related to the justification for [the arrest].").

ment. The transportation of a suspect in custody after an arrest unmistakably serves the objectives of that seizure or arrest, including security and escape prevention concerns as well as ensuring the suspect's presence for trial and other proceedings. Moreover, there is authority indicating that a seizure continues throughout pretrial detention, and law enforcement actions that unreasonably aggravate the intrusion of privacy engendered by the seizure violate the Fourth Amendment, and the Second Circuit in *Lauro* analyzed the perp walk context from this perspective.³⁶⁷ The Supreme Court has applied the Fourth Amendment reasonableness test to pretrial detainees in a manner which balances the invasion of personal rights of the detainees against the government's need for the invasion in light of the special government needs present in the pretrial detention situation, including safeguarding security and preventing escape.³⁶⁸ Thus, the movement of a suspect in custody where there is a legitimate law enforcement justification, such as transporting the suspect from the place of arrest or to and from a court appearance, does not unreasonably intrude on his privacy and comports with the Fourth Amendment.³⁶⁹ Indeed, it is related to the objectives of the initial arrest and/or the foremost purpose of pretrial detention (which is also an objective of arrests)—ensuring that the detainee appears in court to face the charges against him.³⁷⁰ However, under the Supreme Court's analysis, which examines individual law enforcement actions for reasonableness, this conclusion is not sufficient to justify

³⁶⁷ See, e.g., *Albright v. Oliver*, 510 U.S. 266, 277-79 (1994) (Ginsburg, J., concurring); *Lauro v. Charles*, 219 F.3d 202, 212 (2d Cir. 2000). Issues regarding temporal scope of the Fourth Amendment and a seizure for its purposes vis-a-vis pretrial detention are discussed in Part IV.B, *infra*. Furthermore, a perp walk might also be viewed as a separate seizure from the arrest. See *Lauro*, 219 F.3d at 212.

³⁶⁸ See *Bell v. Wolfish*, 441 U.S. 520, 544-47, 559 (1979). This reasoning would certainly apply to a person who is under arrest, but not formally classified as a pretrial detainee as well given that the special needs of preventing escape and maintaining security are also present. See Part IV.B, *infra* regarding pretrial detainee classification.

³⁶⁹ See *Lauro*, 219 F.3d at 212-13.

³⁷⁰ See *Bell*, 441 U.S. at 534. It should be noted that in the analysis regarding the reasonableness of law enforcement conduct surrounding perp walks that follows, it should be assumed that the initial arrest and/or pretrial detention of the suspect are reasonable. It goes without saying that an arrest, seizure, or pretrial detention that is unreasonable and accompanied by a perp walk is unreasonable.

actions by law enforcement officials to choreograph a perp walk or otherwise collude with members of the press. Thus, choreographing a perp walk or other government conduct that facilitates the viewing and capturing of images of the legitimate transportation of suspect in custody by the press must be related to the objectives of the lawful seizure of the suspect or the legitimate movement to be reasonable.³⁷¹

Law enforcement actions colluding with the media in choreographing perp walks as well as other acts taken in collusion or collaboration with the media in facilitating the media's observation and obtaining of images of a perp walk, such as the exhibition and distribution of a videotape of a perp walk to the press as occurred in *Caldarola*,³⁷² are not related to the objectives of the law-

³⁷¹ This is the case regardless of whether a perp walk is viewed as an exacerbation and continuation of the original seizure or as a separate seizure, since the objectives of the legitimate transportation of a suspect are part and parcel with the objectives of the lawful original seizure and/or pretrial detention, as discussed above. This is consistent with the *Lauro* court's finding that a perp walk must be reasonable in either case and its failure to distinguish between these approaches in its analysis. 219 F.3d at 212. Likewise, in the former situation, the analysis is the same regardless of whether a perp walk is viewed as an integral part of the original seizure (which must be reasonable and be carried out in a reasonable manner) or as a manner of carrying out the original seizure (which must be related to the objectives of the original seizure). This is because the objectives of the legitimate transportation of a suspect are part and parcel with the objectives of the lawful original seizure and/or pretrial detention. Strictly speaking, one might say that if a perp walk is viewed as an exacerbation and continuation of the original seizure, the perp walk and law enforcement actions taken during and in conjunction in it must be related to the objectives of that underlying seizure to be reasonable, while if a perp walk or transportation of a suspect in custody is viewed as a separate underlying seizure, law enforcement actions taken during and in conjunction with it must be related to the objectives of that legitimate transportation of the suspect in custody. However, as indicated above, the analysis is essentially the same given that the objectives of the legitimate transportation of a suspect are part and parcel with the objectives of the lawful original seizure and/or pretrial detention. It should be noted that the *Lauro* court relied on the fact that a staged perp walk "was unrelated to the object of the arrest" and indicated that it violated the Fourth Amendment "by exacerbating [the suspect's] seizure in an unreasonable way." 219 F.3d at 213; see also *supra* note 250.

³⁷² Indeed, it is beyond peradventure that law enforcement collaborates, colludes, or cooperates with the press in assisting the press in obtaining images of a perp walk when law enforcement exhibits and distributes copies of a videotape of a perp walk to the press or makes a videotape for this purpose or to inform the public of law enforcement efforts, as was the case in *Caldarola*, given that law enforcement actually provides the media with images of the perp walk in this situation.

ful underlying seizure or the legitimate transportation of a suspect in custody.³⁷³ Therefore, such actions cause a seizure and specifically the movement of the suspect to be carried out in an unreasonable way and violate the Fourth Amendment.³⁷⁴ To orchestrate choreographed perp walks, law enforcement officials engage in activities such as informing the media when and where the movement of a suspect in custody will occur, delaying suspect movements to create photo opportunities or to allow for media members to get into position, conducting perp parades where a suspect is transported in public for a longer distance than is necessary to achieve the legitimate movement (such as a movement from a police station to court) to be accomplished, and using physical force against the suspect to aid the media in capturing images of him. None of these actions by law enforcement are related to legitimate law enforcement justifications for transporting a suspect in custody, such as transportation from the place of arrest to the stationhouse, to and from a court appearance, booking, or oth-

³⁷³ Because such actions in carrying out the transportation of a suspect are unrelated to the objectives of the legitimate transportation of the suspect, they are also unrelated to the objectives of the original seizure, to which the legitimate transportation of suspect is related. A method of carrying out a legitimate movement of a suspect in custody that is unrelated to the objectives of such a legitimate movement is also unrelated to the objectives of the original seizure, which are served by the legitimate transportation of a suspect in custody and its objectives. Indeed, as discussed above, the objectives of the legitimate transportation of a suspect in custody are part and parcel and comport with the objectives of the original seizure and/or pretrial detention.

As discussed in note 389, *infra*, the making of a videotape of a perp walk by law enforcement may be reasonable in some circumstances but was not in *Caldarola*, where it was done in the context of an effort to collaborate with the media in facilitating the media's viewing and obtaining of images of the perp walk.

³⁷⁴ Although the Second Circuit in *Caldarola* acknowledged the rule that a search and seizure must not only be reasonable in itself but must be carried out in a reasonable manner, *see supra* note 211, it provided no explanation or analysis with respect to this rule and fundamentally erred in its application. As discussed above, the Second Circuit inappropriately considered the fact that the movement of the suspect was reasonable in determining if the way it was carried out was reasonable. Second, the Second Circuit made no attempt to show that the making and distribution to the media of the videotape of the perp walk in *Caldarola* was related to the objectives of the lawful seizure or the legitimate movement of the suspect in custody, as would be required by the framework derived from Supreme Court precedent. Indeed, as discussed here, the Second Circuit could not have succeeded in such an endeavor, given that such conduct, like the choreography of a perp walk, is not related to the objectives of the lawful seizure or the legitimate transportation of a suspect in custody.

er legitimate movement in the normal course of movement of a suspect from place to place by the police, with a direct law enforcement objective related to the lawful arrest or pretrial detention of the suspect.³⁷⁵ Likewise, other actions taken by law enforcement in collaboration with the media to assist the media in viewing or obtaining images of the transportation of a suspect in custody, such as the law enforcement conduct addressed by the Second Circuit in *Caldarola* where the government videotaped the transportation of suspects in custody, exhibited the tape to members of the media not present at the time of the transportation, and provided copies of the tape to members not present at the time of the transportation, are not related to legitimate justifications for transporting a suspect in custody or the underlying seizure.³⁷⁶ Thus, under Supreme Court precedent, *Caldarola* was wrongly decided by the Second Circuit with respect to the videotaped perp walk as well as by the District Court with respect to this perp walk and the conventional choreographed perp walk.³⁷⁷

However, such actions might serve the law enforcement purpose of publicizing the apprehension of suspects.³⁷⁸ Indeed, in *Caldarola*, the Second Circuit held that the making and dissemination of the video tape of the perp walk, a situation discussed above, that is highly similar to a choreographed perp walk, was, at least in part, justified by the law enforcement purpose of informing the public about law enforcement efforts, which also may convince witnesses to come forward and deter potential future

³⁷⁵ A staged perp walk, for instance, is not a legitimate movement of a prisoner and is not in the normal course of moving a suspect from place to place by the police.

³⁷⁶ Indeed, facilitating the observation of a legitimate transportation of a suspect in custody by the media is unrelated to the justifications for, and purposes of, such a transportation or the underlying seizure as is collusion or collaboration with the media to serve such a purpose. For further explanation of the conclusion that the making of the videotape in *Caldarola* was improper under the Fourth Amendment, see note 373, *supra*, and note 389, *infra*.

³⁷⁷ Likewise, the reasoning by district courts in cases such as *Watkins* that a perp walk comports with the Fourth Amendment so long as it serves a legitimate law enforcement purpose, such as the transportation of a suspect to the police station, is improper. That a perp walk involves a legitimate transportation of a suspect is insufficient to render it reasonable. A perp walk is only proper if the manner in which it is carried out is reasonably related to the purposes of such a transportation of a suspect or the underlying seizure.

³⁷⁸ See Kaiser, *supra* note 3, at 1225.

wrongdoers, and that such a purpose is legitimate.³⁷⁹ However, the Supreme Court does not permit such generalized law enforcement objectives to overcome Fourth Amendment rights.³⁸⁰ Rather, the Court requires the manner in which a seizure is carried out be related to the objective of that specific lawful seizure.³⁸¹ Indeed, the *Wilson* Court expressly found that accurate reporting and informing the public about police activities is insufficient to justify invasion of the privacy of the suspect in the media ride-along context because it bears no direct relation to the constitutional justification for the legitimate invasion of the suspect's privacy resulting from a lawful execution of an arrest warrant in the home.³⁸² This argument is equally applicable in the perp walk context. Informing the public of the arrest and allowing the public to view images of the suspect in custody bear no direct relation to any legitimate justification for law enforcement officers to transport a suspect in custody or for the underlying seizure.³⁸³ Thus, the accurate reporting of and informing the public about law enforcement activities are not adequate justifications for the choreography of a perp walk or other police conduct in cooperation with the media to facilitate the observation of the transportation of the suspect in custody by the media, or for that matter, any form of perp walk.³⁸⁴ Indeed,

³⁷⁹ *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 576 (2d Cir. 2003).

³⁸⁰ See *Wilson v. Layne*, 526 U.S. 603, 612 (1999) ("[F]urther[ing] the law enforcement objectives of the police in a general sense . . . is not the same as furthering the purposes of the search."); see also *Lauro v. Charles*, 219 F.3d 202, 212-13 (2d Cir. 2000); Kaiser, *supra* note 3, at 1224; *infra* note 390.

³⁸¹ See *Wilson*, 526 U.S. at 611.

³⁸² *Id.* at 613.

³⁸³ Indeed, in *Caldarola*, the Second Circuit erred in indicating that such a justification that is unrelated to the objectives of the legitimate transportation of a suspect in custody could support a perp walk.

³⁸⁴ As discussed above, there is an argument that the purpose of accurate reporting of law enforcement activities is advanced by a choreographed perp walk but is not promoted (or promoted to a lesser extent) by a staged perp walk. See *supra* notes 351, 353. As discussed above, such an argument does not appear to be weighty. However, even assuming that such a purpose were furthered by choreographed but not staged perp walks, it would not be adequate to support a choreographed perp walk because, as discussed here, it is unrelated to the objective of the legitimate transportation of a suspect in custody. See also *supra* note 351. Nonetheless, the existence of such an argument raises a further complication in the analysis that should be addressed. As discussed above, the *Caldarola* court inappropriately considered the legitimacy or reasonableness of the transportation of a suspect in custody itself in determining if the

the Second Circuit itself extended this reasoning to conclude that informing the public does not justify a perp walk in *Lauro*, albeit in the staged perp walk context, pointing to *Wilson* for the proposition that accurate reporting of law enforcement activities was a generalized law enforcement objective insufficient to trump Fourth Amendment rights.³⁸⁵

way in which it was carried out was reasonable. *See supra* note 365 and accompanying text. Indeed the *Caldarola* court's statements that justifications rejected in *Lauro* were valid because of the legitimacy of the arrest and that the coordinated nature of the arrests did not alter the legitimacy of the transportation of the suspect in custody indicate that the court considered the legitimacy of the transportation in determining if the method in which it was carried out was reasonable. One might argue that if it is the case that the justification for exposing a suspect to the media of promoting accurate reporting of law enforcement activities turns on the legitimacy of the movement of the suspect in custody, the Second Circuit did not inappropriately consider the reasonableness of the transportation of a suspect in determining whether the transportation was carried out in a reasonable manner. Under this view, the court's references to the legitimacy of the movement can be taken as merely a part of demonstrating that a specific justification for the way the movement was carried out was applicable, rather than inappropriate consideration of the reasonableness of the movement itself as demonstrative that the way in which it was carried out is reasonable. The Second Circuit did not state that it was taking such an approach and its general statements suggest that it considered legitimacy of the transportation of the suspect to render the manner in which it was carried out reasonable. However, to the extent that one might consider *Caldarola* to have properly evaluated the reasonableness of the way in which the transportation of the suspect was carried out divorced from the reasonableness of the transportation in and of itself and found a choreographed perp walk to be reasonable on the basis of an interest in accurate reporting and informing the public applicable only in the context of a legitimate transportation of suspect, the *Caldarola* court's conclusion still is not vindicated. This is because, as discussed here, any justification related to publicizing or reporting of law enforcement activities is insufficient to justify a choreographed perp walk because the choreography of a perp walk bears no direct relation to the objectives of the lawful underlying seizure or the legitimate transportation of a suspect in custody.

³⁸⁵ *Lauro*, 219 F.3d at 212-13 (quoting *Wilson*, 526 U.S. at 612-13); *see also supra* note 355; *infra* note 390. It should be noted that a justification that does not vindicate a staged perp walk that serves no legitimate purpose will not support a perp walk organized by the police that serves no legitimate purpose just because it takes place in connection with a legitimate movement of a suspect in custody. This is because in both cases, the perp walk itself has no legitimate purpose as it bears no direct relation to the specific lawful seizure at issue. Thus, no justification will suffice. In the former case, a staged perp walk is unreasonable and unrelated to a lawful arrest or pretrial detention. In the latter case, a choreographed perp walk (or related law enforcement action) is unrelated to these objectives as well as the legitimate objective of the legitimate transportation of a suspect in custody (which is not implicated in a staged perp walk).

However, one might distinguish the perp walk context from the media ride-alongs addressed in *Wilson*, at least in certain cases. In rape and burglary cases, perp walks have an especially important law enforcement purpose that is not present in the ride-along situation. In these types of cases, perp walks are especially effective in helping law enforcement unearth new victims and witnesses.³⁸⁶ However, despite the importance of these purposes, they still do not justify law enforcement collusion with the media to orchestrate perp walks. In *Wilson*, the Supreme Court held that the Fourth Amendment required that law enforcement actions in carrying out a lawful seizure be related to the objectives of the seizure and indicated that generalized law enforcement objectives were insufficient to warrant infringement on Fourth Amendment rights.³⁸⁷ The Court did not qualify this requirement to permit infringements on Fourth Amendment rights in the process of carrying out reasonable and lawful seizures unrelated to the objective of the seizure to vindicate other governmental interests, no matter how important. Investigative purposes are general law enforcement purposes and are not related to the objectives of the initial seizure, pretrial detention, and legitimate transportation of suspects in custody, such as ensuring the suspect's appearance at

Furthermore, one should note that the *Caldarola* court appears to have mischaracterized *Lauro*'s holding that there was no legitimate government purpose behind a staged perp walk as being "precisely because of the staged nature of the walk." *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 576 (2d Cir. 2003). The *Lauro* court indicated that the need for accurate reporting bears no direct relation to the constitutional justifications for a lawful arrest, perp walk, or transporting a suspect in custody and is a generalized law enforcement objective insufficient to trump Fourth Amendment protections. 219 F.3d at 212-13. As discussed above, such reasoning is equally applicable to conduct that takes place in connection with a perp walk that takes place in connection with the legitimate transportation of a suspect in custody, such as a choreographed per walk, and a staged perp walk that does not. See *supra* notes 350, 355. Indeed, as also noted above, the *Lauro* court only relied on the fact that a staged perp walk was unrelated to a legitimate transportation of a suspect in the context of a hypothetical alternative assuming that there is a legitimate state interest in accurate reporting of police activity (a proposition rejected in *Wilson*). See *id.* Likewise, the fact that the *Lauro* court expressly stated that it did not decide whether conduct constituting a choreographed perp walk comported with the Fourth Amendment, which was not before it, does not alter the fact that its reasoning extends to the context of choreographed perp walks (and related law enforcement conduct).

³⁸⁶ See Martin, *supra* note 41.

³⁸⁷ 526 U.S. at 611-12; see also *Lauro*, 219 F.3d at 212-13.

trial and transporting him to and from a court appearance without escape.³⁸⁸

In addition, in *Caldarola*, the Second Circuit indicated that two other justifications disapproved in *Lauro*, which include (1) that law enforcement officers should have the discretion to decide when a perp walk will further the mission of law enforcement and (2) that the presence of media could deter law enforcement abuses, that were rejected in the media ride-along context in *Wilson*, supported the constitutionality of the making of the videotape of a legitimate transportation of a suspect in custody as well as the exhibition and distribution of the videotape to the media.³⁸⁹ As

³⁸⁸ Thus, the district court's reliance on the identification of potential victims given the particular nature of the offense at issue in *Gibbons* was improper.

³⁸⁹ *Caldarola*, 343 F.3d at 576-77 ("The government purposes that were rejected in *Lauro* are valid in this situation because [law enforcement] videotaped [the suspect] as he was being legitimately transported pursuant to a lawful arrest."). The *Caldarola* court expressly pointed to the deterrence of law enforcement abuse as a justification. See *id.* at 576 n.3. While the *Caldarola* court did not expressly enumerate the justification that law enforcement officers should have the discretion to decide when a perp walk will further the mission of law enforcement, in addition to its statement that the purposes rejected in *Lauro* were valid in the context of a legitimate transportation of a suspect in custody, it distinguished *Wilson* on the basis that the government's claim that the media ride-along at issue in that case would further its law enforcement mission on the basis that *Wilson* involved entry into a private home and suggests that such a justification could support constitutionality where residential privacy is not implicated, such as in the perp walk context. See *id.* at 577.

In *Wilson*, the Supreme Court noted that "it might be reasonable for police officers to themselves videotape home entries as part of a 'quality control' effort to ensure the rights of homeowners are being respected, or even to preserve evidence." 526 U.S. at 613. Such reasoning might be extended to the perp walk context inasmuch as the recording of a perp walk might serve as quality control by law enforcement to ensure that the rights of the suspect, such as the right to avoid beatings or other instances of police brutality, are being respected. Furthermore, the mere making of a videotape of a perp walk by law enforcement officers and its viewing by law enforcement officers infringes on a suspect's privacy rights to a relatively small degree, as such actions do not implicate public humiliation or erosion of the presumption of innocence in the way law enforcement actions increasing media exposure of a perp walk, such as choreographed perp walks or exhibition and distribution of a videotape of the perp walk to the media, cutting in favor of reasonableness where a legitimate purpose exists. Thus, one could argue that the making of the videotape in *Caldarola* by law enforcement might have been reasonable. However, such a situation differs markedly from that at issue in *Caldarola*, where law enforcement exhibited and distributed copies of the videotape to the media. Such conduct indicates that law enforcement made the tape for the impermissible purpose of facilitating the observation and reporting of images of the transportation of a suspect in custody by the media, rather than purposes that the *Wilson* court

discussed above, the Second Circuit's reasoning with respect to these justifications in *Caldarola* extends to the highly-related choreographed perp walk context. As the *Lauro* court indicated, these are generalized law enforcement objectives insufficient to trump Fourth Amendment rights.³⁹⁰ Likewise, as suggested by the *Lauro*

suggested might be acceptable, such as "quality control" with respect to law enforcement actions or protection of the suspect or officers. *Id.* Furthermore, the *Wilson* Court considered the fact that the photographs taken by third-party members of the press were retained by them and not the police cut against a finding that the photographs were taken for such legitimate purposes. *Id.* at 611. In *Caldarola*, the copies of the videotape were given by law enforcement to the media, indicating that they were made for the impermissible purpose of publicizing the perp walk, rather than internal police purposes. Indeed, the *Caldarola* court expressly stated that the purposes for the making of the videotape were the same as those for distributing it to the media—informing the public. 343 F.3d at 576. Moreover, even if the making of the videotape by law enforcement were considered reasonable, the exhibition and distribution of the videotape to the media, at issue in *Caldarola*, have no relation whatsoever to any attempt at "quality control" by law enforcement and accordingly are clearly impermissible.

In sum, the reasonableness of the making of a videotape of a perp walk is a fact-dependent question requiring case-by-case consideration of the circumstances under which the tape was made. In contrast, given the analysis here, the exhibition and distribution of such a videotape to the media is akin to a choreographed perp walk and is unrelated to objectives of the lawful underlying seizure or the legitimate purposes for the transportation of a suspect. Accordingly, such law enforcement actions are not reasonable. It should be noted that regardless of whether the making of a videotape of a perp walk is permissible or is not because the tape was made for the purpose of publicizing the perp walk, as was the case in *Caldarola*, exhibition and distribution of a videotape of a perp walk by law enforcement is always impermissible as it is unrelated to the purpose of the legitimate transportation of a suspect in custody or any of the purposes for law enforcement's videotaping of its own activities articulated in *Wilson* (with the caveat that under *Wilson*, the distribution of the tape to the media cuts against a finding of a legitimate purpose).

In general, the analysis is the same regardless of whether law enforcement conduct surrounding the making of a videotape of a perp walk is considered an exacerbation of the original seizure or a separate seizure of intangible images. *See supra* note 371 and accompanying text. Indeed, the *Caldarola* court noted that videotaping a perp walk constituted a seizure regardless of which of these ways it was characterized and did not distinguish between these characterizations in its analysis. 343 F.3d at 575-77. Further, the legitimate reasons for the making of a videotape of a perp walk raised in *Wilson* can be said to be related to the objectives of the overall seizure or the legitimate transportation of the suspect in custody.

³⁹⁰ 219 F.3d at 212-13 ("The [*Wilson*] Court found that none of these justifications was sufficient to overcome . . . Fourth Amendment rights, noting '[w]ere such generalized "law enforcement objectives" themselves sufficient to trump the Fourth Amendment, the protections [it] guarantee[s] . . . would be significantly watered down.'" (quoting *Wilson*, 526 U.S. at 612)); *see also supra* notes 23-33 and accompanying text (explaining the *Wilson* Court's reasoning for rejecting these justifications which is also

court, they are unrelated to the purposes of the seizure or the actual legitimate movement of the suspect.³⁹¹ Indeed, the *Wilson*

applicable to the staged perp walk context). The *Lauro* court also indicated that the justification discussed above pertaining to accurate reporting on law enforcement activities was a generalized law enforcement objective insufficient to trump the Fourth Amendment, consistent with the discussion above. 219 F.3d at 212-13. As discussed above, although *Lauro* dealt with staged perp walks, this reasoning extends to choreographed perp walks (and related law enforcement conduct). See *supra* notes 348, 355.

³⁹¹ 219 F.3d at 212-13 (indicating that the police actions at issue in *Wilson* for which these justifications were advanced “lacked any legitimate law enforcement purposes”). One might argue that preventing police abuse is related to the objectives of legitimate movement of the suspect and pretrial detention (as well as the lawful underlying seizure), especially given the *Wilson* Court’s acknowledgement that it might be reasonable for police officers to videotape the execution of a warrant for the purpose of ensuring the rights of the suspect and that the presence of third parties during execution of a warrant may be permissible under some circumstances. 526 U.S. at 613. However, such an argument is inconsistent with *Wilson* as applied to the perp walk context. In *Wilson*, the Supreme Court held that the presence of reporters during the execution of an arrest warrant was unrelated to the execution of the warrant. *Id.* at 611. The Court specifically rejected such a justification based on deterring police abuse on the basis that the reporters were working on a story for their own purposes and were not present to protect the officers or suspect as evidenced in part by the fact that the newspaper retained the photographs and not the police. See *supra* notes 231-32 and accompanying text. It is the case that the presence of third parties for any purpose might deter police abuses. Thus, the Court’s language indicates that it did not consider such a generalized purpose of deterring police abuses to bear a direct relation to the execution of the warrant and the arrest. Thus, the Court appears to require some specific nexus between the presence of media and the protection of the suspect during the law enforcement activity in question. Likewise, in a perp walk situation, the media are present to gather images of the suspect for their own purposes and retain photographs and videos captured. Thus, the protection of the suspect from abuse is not adequate to justify a perp walk, such as a choreographed one, or other law enforcement conduct in collaboration with the media to assist the media in obtaining images of the transportation of a suspect in custody.

One might also argue that *Lauro* incorrectly considered the justifications regarding accurate reporting of law enforcement activity and deterrence of law enforcement abuses generalized law enforcement objectives. The Supreme Court in *Wilson* only expressly referred to the justification regarding discretion to decide when an action would further the law enforcement mission as a generalized objective and made the statement that furthering law enforcement objectives in a general sense is not the same as furthering the purposes of the search at issue in that context. 526 U.S. at 612. However, this reasoning extends to the accurate reporting of police activities and deterring police abuses in the sense that while they might further law enforcement objectives in a general sense, as discussed above, they do not further the specific purpose of the legitimate movement of a suspect in custody or the lawful underlying seizure. Accordingly, the *Lauro* court’s identification of such purposes as generalized law enforcement objectives insufficient to trump Fourth Amendment rights is consistent with *Wilson*. See Kaiser, *supra* note 3, at 1224 (“Generalized law enforcement purposes, such

Court indicated that the former justification was not the same as furthering the purposes of the search or seizure at issue³⁹² and suggested that the latter is insufficient to do so as well.³⁹³ Thus, as explained above, these justifications are also inadequate to justify a choreographed perp walk or other law enforcement conduct to collaborate with the media or otherwise facilitate the exposure of a suspect in custody to the media.

Given the Court's strong language in *Wilson*, the Second Circuit attempted to distinguish *Wilson* from the perp walk situation at issue in *Caldarola*.³⁹⁴ The media ride-along situation faced by the *Wilson* Court involved invasion of a private home by the press, an area where an individual has a great expectation of privacy and accordingly receives "a very high degree of privacy protection" from the Fourth Amendment.³⁹⁵ In contrast, the *Caldarola* court concluded that an individual in a perp walk on a public street has a minimal expectation of privacy.³⁹⁶ Thus, the court concluded that the governmental purposes at play here outweighed the minimal privacy interest impaired by a perp walk.³⁹⁷ However, this argument also fails. As discussed above, the justifications for police conduct in connection with a perp walk facilitating the observation and acquisition of images of the event by the media, as occurs in a choreographed perp walk and the related situation addressed by the Second Circuit in *Caldarola*, accepted as legitimate by the *Caldarola* court, have been discredited both by the Supreme Court and by the Second Circuit in *Lauro*. Thus, they do not outweigh even a small privacy interest.³⁹⁸ Furthermore, the Supreme Court has never restricted its requirements that seizures

as providing the public with a view of police business and deterring police abuses through media access, are not sufficient justifications by themselves.").

³⁹² 526 U.S. at 612.

³⁹³ See *supra* note 390.

³⁹⁴ *Caldarola*, 343 F.3d at 576-77.

³⁹⁵ *Id.* at 575 (citing *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313 (1972)).

³⁹⁶ *Id.* at 577.

³⁹⁷ See *id.*

³⁹⁸ Indeed, the *Lauro* court indicated that such generalized law enforcement objectives were not themselves sufficient to trump the Fourth Amendment. *Lauro v. Charles*, 219 F.3d 202, 212-13 (2d Cir. 2000) (citing *Wilson v. Layne*, 526 U.S. 603, 612 (1999)). Likewise, they do not bear a direct relation to the purposes of the legitimate transportation of a suspect.

be conducted reasonably and that law enforcement actions in executing a seizure must be related to the objectives of the lawful seizures occurring in the home. Although the *Wilson* Court discussed the right of residential privacy in its opinion, as the Second Circuit itself concluded in *Lauro*, the holding in *Wilson* did not turn solely on the special status of the home. Indeed, the Court does not restrict the Fourth Amendment to the home.³⁹⁹ Directly relevant to the perp walk context and as articulated by the Second Circuit itself in *Lauro*, there is authority indicating that the Fourth Amendment protects suspects under arrest or even in pretrial detention from unreasonable exacerbations of the intrusion on privacy effectuated by their seizure that certainly would occur outside the home.⁴⁰⁰ As discussed above, a choreographed perp walk and perp walks entailing related collusive elements constitute an unreasonable manner to carry out the underlying seizure and in particular the transportation of a suspect in custody.

Furthermore, the *Caldarola* court's conclusion that a perp walk, and a videotaped one in particular, infringes only a minimal reasonable expectation of privacy is inconsistent with Supreme Court precedent. In *Terry*, the Court noted that a "stop and frisk" of a person, where the person is physically handled in a brief search for weapons by the police while standing helpless in public, constitutes a significant intrusion on the person's privacy and dignitary interests protected by the Fourth Amendment.⁴⁰¹ Thus, the Court considers an individual to have a significant privacy interest in avoiding seizure and being handled by the police in public. Under the *Caldarola* court's reasoning, a stop and frisk conducted in public would not implicate material privacy interests for the sole reason that it took place in public. Thus, this reasoning is

³⁹⁹ See, e.g., *Katz v. United States*, 389 U.S. 347, 351 (1967) (indicating that "the Fourth Amendment protects people, not places" in finding that the Fourth Amendment protected an individual's privacy in a telephone booth); see also *Terry v. Ohio*, 392 U.S. 1, 16-17 (1968) (finding that a person is entitled to the protections of the Fourth Amendment on a public street).

⁴⁰⁰ 219 F.3d at 212 (citing *Albright v. Oliver*, 510 U.S. 266, 277-79 (1994) (Ginsburg, J., concurring)). Issues regarding temporal scope of the Fourth Amendment and a seizure for its purposes vis-a-vis pretrial detention are discussed in Part IV.B, *infra*.

⁴⁰¹ *Terry*, 392 U.S. at 16-17 ("[S]uch a procedure performed in public by a policeman while the citizen stands helpless . . . is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment . . .").

contrary to *Terry*. A perp walk is a far more humiliating experience than merely being frisked. The suspect is not only physically handled by the police, but often is also wearing physical restraints and/or prison garb while in the custody of the police. Thus, perp walks implicate privacy and dignitary interests although they are conducted in public. However, a counterargument might be based on the fact that the Supreme Court has held that there is no reasonable expectation of privacy or Fourth Amendment protections in "[w]hat a person knowingly exposes to the public."⁴⁰² This situation is inapposite to both the perp walk and "stop and frisk" situations. Although a perp walk and "stop and frisk" occur in public, a suspect has not knowingly exposed himself to the public in either situation. Rather, the suspect is seized by the police and is forcibly humiliated by them in public. Thus, under *Terry*, a citizen has a material reasonable expectation of privacy in these situations that is protected by the Fourth Amendment and thus only can be invaded in the course of a seizure conducted in a reasonable manner.

Therefore, a choreographed perp walk is an unreasonable means of carrying out a seizure, and particularly, the legitimate movement of a seized suspect in custody as it is wholly unrelated to the objectives of a lawful arrest or seizure, pretrial detention, or the legitimate transportation of a suspect.⁴⁰³ Under this reasoning, law enforcement actions that serve to assist the media in capturing images of a suspect in custody during a legitimate move-

⁴⁰² *Katz*, 389 U.S. at 351. For related discussion, see *supra* note 321.

⁴⁰³ As the above discussion indicates, the Second Circuit committed multiple errors vis-a-vis the Supreme Court's Fourth Amendment jurisprudence in its opinion in *Caldarola*, holding that the making, exhibition, and distribution of copies of the videotape comported with the Fourth Amendment. See generally *Caldarola v. Cnty. of Westchester*, 343 F.3d 570 (2d Cir. 2003). First, the Second Circuit inappropriately considered the fact that the movement of the suspect was legitimate and reasonable in determining if the way the movement was carried out, in other words the perp walk, was reasonable. See *id.* at 571-77. Second, the Second Circuit failed to examine whether law enforcement actions in choreographing the arrests and exhibiting and distributing copies of the videotape to the press were in any way related to the objectives of the underlying seizure or the legitimate transportation of a suspect in custody. *Id.* The court also relied on justifications that were unrelated to such objectives and constituted generalized law enforcement purposes as well as improperly discounted the material privacy interest implicated by perp walks because they do not take place within the home. *Id.*

ment, but are unrelated to the purpose of the movement itself, do not comport with the Fourth Amendment. Such actions include law enforcement collusion with the media, informing them of the time and place where a suspect will be transported in a public place as well as law enforcement's determination of the time of the movement or delaying in order to facilitate the media's presence at the place of transportation as occurred in conjunction with the courthouse perp walk in *Caldarola*. Likewise, the exhibition and distribution of copies of a videotape of a perp walk also at issue in *Caldarola* and other acts of collusion or collaboration by law enforcement with the media to facilitate the observation or acquisition of images of a perp walk by the media, as well as perp parades and the use of physical force against the suspect during transportation to facilitate the media's viewing of him, also fail to comport with the Fourth Amendment for these reasons.

However, not all perp walks are unrelated to the legitimate law enforcement justification for transporting a suspect or the objectives of a lawful arrest or seizure. Thus, perp walks are not necessarily unreasonable. For instance, police necessarily must transport suspects in custody in public places when they are arrested in a public place or need to be taken to a police vehicle after an arrest in a private place and when transporting them to and from public courthouses.⁴⁰⁴ Police officers cannot prevent reporters from capturing images of suspects in custody when they are transported in public places.⁴⁰⁵

Indeed, the Fourth Amendment does not require that police transport suspects in custody "in some sort of optimal, preferred, or least intrusive manner" calculated to maximize privacy.⁴⁰⁶ Rather, it merely requires that transportations be performed in a reasonable manner—that is, that police behavior in conducting a legitimate transportation of a suspect in custody be related to its actual objective of effecting the movement of the suspect (and thus

⁴⁰⁴ See, e.g., *Watkins v. City of Highland Park*, 232 F. Supp. 2d 744, 752, 760 (E.D. Mich. 2002) (involving an arrest at a "rave" party open to the public and the transportation of the suspect outside to a police vehicle).

⁴⁰⁵ See Kaiser, *supra* note 3, at 1210.

⁴⁰⁶ *Watkins*, 232 F. Supp. 2d at 760.

the objectives of the underlying arrest or seizure).⁴⁰⁷ As discussed above, police collusion with the press and choreographed perp walks as well as the exhibition and distribution of copies of a videotape of a perp walk to the press addressed by the Second Circuit in *Caldarola* are unreasonable under this standard. However, police conduct need not be this flagrant to be unreasonable and unrelated to the objectives of a lawful underlying seizure or a legitimate transportation of a suspect in custody.

Moreover, the Supreme Court employs a similar reasonableness analysis in a variety of Fourth Amendment contexts, such as assessing the constitutionality of a "stop and frisk" and the degree of force used to effect an arrest.⁴⁰⁸ The reasonableness of police conduct, including the manner in which a transportation of a suspect in custody or a perp walk is conducted, "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."⁴⁰⁹ Thus, the Court has articulated that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving"⁴¹⁰ Accordingly, police actions do not necessarily violate the Fourth Amendment merely because they seem unnecessary when later evaluated by a court.⁴¹¹ Like the situations discussed by the Court, this standard is suited for the perp walk context because decisions about when or how a suspect should be moved are often made quickly on the scene by law enforcement officers in response to the particular circumstances. The Fourth Amendment reasonableness inquiry is an objective one—"the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."⁴¹² Thus, police intention in transporting a suspect to expose him to the press or to punish, shame, or humiliate him will not make an ob-

⁴⁰⁷ See *id.*

⁴⁰⁸ See, e.g., *Graham v. Connor*, 490 U.S. 386, 397 (1989).

⁴⁰⁹ *Id.* at 396 (citing *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)).

⁴¹⁰ *Id.* at 396-97.

⁴¹¹ See *id.* at 396.

⁴¹² *Id.* at 397 (citing *Scott v. U.S.*, 436 U.S. 128, 137-39 (1978); *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

jectively reasonable perp walk, where the circumstances permitting the press to obtain images of the suspect were related to the legitimate movement of the suspect or the objectives of the lawful underlying seizure, unreasonable. For example, the fact that a police officer intended that the press view a suspect while transporting him in public to a public courthouse (or intended to punish, shame, or humiliate the suspect in such a way) does not render this reasonable perp walk unconstitutional. Conversely, a law enforcement officer's good intentions do not make an objectively unreasonable perp walk—one that a reasonable law enforcement officer would not consider related to the purposes of a lawful seizure or the legitimate transportation of the suspect—comport with the Fourth Amendment. As discussed above, a choreographed perp walk and other law enforcement conduct involving collusion between the police and the media to orchestrate the media's viewing of the defendant in custody, are not objectively reasonable because a reasonable police officer would not consider them related to the purposes of a lawful seizure or the legitimate transportation of a suspect, such as transporting him to the police station for booking or a court appearance safely without allowing him to escape. Indeed, the exhibition and distribution of the videotape of the perp walk to the media at issue in *Caldarola* were not objectively reasonable as such conduct would not be considered related to the purpose of the legitimate transportation of a suspect or the objectives or purposes of the lawful underlying seizure by a reasonable police officer.

Outside of drawing a distinction between staged and choreographed perp walks or between perp walk situations involving legitimate movements of suspects in custody and those that are not, however misguided, courts addressing the constitutionality of perp walks have devoted little attention to the reasonableness of individual police actions during a perp walk, likely because the current perp walk doctrine considers all unstaged perp walks, that is all perp walks involving a legitimate transportation of suspect in custody, reasonable. However, in *Watkins*, a federal district court in the Eastern District of Michigan addressed a suspect's claim that his unstaged and unchoreographed perp walk was unconstitutional because police officers led him out through the main entrance of the building where he was arrested during a "rave"

party and past the press, rather than through a side door where no reporters were present as he requested.⁴¹³ The court held that this perp walk was reasonable and did not violate the Fourth Amendment, noting that law enforcement officers need not transport a suspect in custody in a public place in the way most likely to minimize exposure of the suspect to the press for the transportation to be conducted in a reasonable manner.⁴¹⁴ The transportation of a suspect under arrest to the police station served an obvious law enforcement purpose and the leading of the suspect out of the front door was related to that purpose.⁴¹⁵ Thus, the court refused to scrutinize the conduct of the police officers to determine whether the suspect should have been led out of one entrance of a building versus another and noted that leading a suspect out of the main entrance of a building was routine police practice.⁴¹⁶

Although the district court in *Watkins* did not engage in detailed analysis of the reasonableness of the perp walk in that case, its conclusion that the perp walk was reasonable is consistent with the Supreme Court's framework for evaluating the reasonableness of police conduct. The decision to transport the defendant in *Watkins* out of the main entrance, despite his request to be transported out of a side entrance, is objectively reasonable from the perspective of a reasonable officer on the scene. It was made under tense, unpredictable, and evolving circumstances—after an arrest in a public place. Furthermore, security concerns render any transportation of a suspect in custody an unpredictable and potentially rapidly evolving circumstance. There are numerous reasons related to the purpose of legitimately transporting the suspect or the objectives of the underlying arrest or seizure for law enforcement officers to transport him out of the main entrance of a building. The officers might be more familiar with the main entrance, it may be better lit, or closest to police vehicles. In *Watkins*, the suspect's request that he be transported out of a specific

⁴¹³ See *Watkins v. City of Highland Park*, 232 F. Supp. 2d 744, 760 (E.D. Mich. 2002).

⁴¹⁴ See *id.*

⁴¹⁵ See *id.*

⁴¹⁶ See *id.* at 760-61.

secondary entrance might suggest a risk that the arrestee selected that entrance because using it would make it easier to escape or create danger for the officers. Thus, the officers' decision not to abide by this request was completely reasonable even though it resulted in increased exposure of the defendant to the media.

Therefore, police conduct in transporting a suspect in custody does not violate the Fourth Amendment if a reasonable police officer on the scene would consider the conduct related to the purposes of the transportation or the underlying seizure under the circumstances, even if that conduct facilitates the press's ability to observe the suspect and capture images of him. A reasonable police officer could not consider collaboration with the media to ensure the ability of reporters to observe or procure images of the suspect while being transported, as in a choreographed perp walk or the related context of exhibition and distribution of a videotape of a perp walk at issue in *Caldarola*, related to the purposes of a legitimate transportation of a suspect in custody or the underlying seizure, such as bringing him to the police station after arrest or to and from a court appearance. Thus, as discussed above, choreographed perp walks and other law enforcement conduct wholly unrelated to the legitimate governmental interest in effecting the transportation of the suspect or the objectives of the lawful underlying arrest or seizure of the suspect, such as the exhibition and distribution of copies of a videotape of a perp walk to the media, perp parades, and the use of physical force by police against the suspect to assist the media in capturing his image, violate the Fourth Amendment. On the other hand, law enforcement conduct in effecting the transportation of a suspect that facilitates the press's observation of the transportation that a reasonable police officer would also consider to promote the effective completion of the transportation does not violate the Fourth Amendment. In many cases, absent evidence of collaboration or collusion between law enforcement officers and members of the press, whether police conduct in transporting a suspect is reasonable will depend on the facts and circumstances of a particular case.⁴¹⁷ Evidence that the

⁴¹⁷ Of course, this statement is merely a generalization and not a hard-and-fast rule and raises the issue of how broadly one views choreography, collusion, collaboration, or cooperation with the media. It is beyond peradventure that that this encompasses law

enforcement conduct involving communication with or dissemination of information or images to the media, such as informing the media of the time and place of the movement of a suspect in custody or exhibiting and distributing copies of a video recording of a perp walk to the press, as well as actions taken in response to a request from the press (in the context of a legitimate movement of the suspect). However, some conduct associated with choreographed perp walks discussed above need not necessarily involve actual communication or contact with the press, such as the use of physical force to facilitate the capturing of images of a suspect by the media, perp parades, and delaying the movement of a suspect in custody in aid of the media's ability to view and capture images of the movement. This issue is not expected to arise often as such conduct likely occurs in conjunction with contact with the press (which would surely render it under the purview of choreography or collaboration). Indeed, it seems highly unlikely that law enforcement would engage in such actions without some obviously collusive contacts or understanding with the media, at the very least which would let law enforcement know that its actions would facilitate the media in observing or capturing images of the perp walk. For instance, law enforcement would presumably need to learn from the press that a scheduled movement was inconvenient in order to delay it. Nonetheless, it is possible that a police officer might engage in such conduct in facilitation of the press's observation of and capturing images of a transportation of a suspect in custody on his own volition without any request from or contact with the press. In such a situation, there is an argument that such conduct does not constitute choreography or collaboration. However, given the relationship between law enforcement and the media in the perp walk context, such acts of facilitation of the media in observing and capturing images of the transportation of the suspect in custody can be viewed as acts of choreography and collaboration. One commentator has favored a broad view, indicating that scheduling a transfer to facilitate or to provide the media the opportunity to obtain footage is a choreographed perp walk. See Chanoine, *supra* note 19, at 1367-68. Indeed, there may be an implicit and/or longstanding understanding between law enforcement and the media such that collusion can occur without communication or contact with respect to a particular perp walk. It should be noted that even if the scope of choreography or collaboration is viewed narrowly, whether in fact choreography or collaboration occurred will depend on the circumstances of the individual case and may not necessarily be obvious, as where there is direct contact between law enforcement and the press. However, as if often the case, where collaboration is obvious or easily discernable from the facts and circumstances of a case, significant analysis of further specific facts and circumstances will likely not be required to demonstrate objective unreasonableness. Likewise, where the circumstances show collaboration of a less obvious or flagrant sort, further significant analysis will not be necessary, although closer consideration of the circumstances in determining collaboration will likely be necessary.

As discussed above, choreography of a perp walk and law enforcement collusion, collaboration, or cooperation with the media in facilitating the observation and/or capturing images of a perp walk by the media is not objectively reasonable as a reasonable police officer would consider it unrelated to the purposes of the legitimate transportation of a suspect in custody or the lawful underlying seizure. Thus, if law enforcement conduct constitutes or results from choreography, collaboration, collusion, or cooperation, it is unreasonable for Fourth Amendment purposes. Nonetheless, the issue described in the previous paragraph relating to the scope of choreographed or collabora-

tive conduct appears to have little practical effect in the analysis of reasonableness. For instance, regardless of whether a situation where a police officer observes members of the media present during an otherwise unchoreographed perp walk and on his own volition, without any prodding from or contact with the press, he uses physical force on the suspect to facilitate the capturing of images of the suspect by the media is considered collusive or collaborative, such law enforcement conduct is unreasonable as the use of physical force to facilitate observation of the suspect is completely devoid of relation to the purposes of the legitimate transportation of a suspect in custody or the lawful underlying seizure. The same is true for perp parades and delay to facilitate or aid the media's observation and capture of images of a perp walk. Where the facts and circumstances indicate that such an action associated with choreographed perp walks is taken in aid or facilitation of the media (if such an act is not considered collaboration, such as under the narrow view discussed above), significant further analysis of the particular facts and circumstances is not likely necessary to demonstrate unreasonableness (as is the case for collaboration, as discussed above). Of course, the amount of analysis of the particular facts and circumstances of a particular case in determining whether such an action associated with choreographed perp walks is unreasonable as taken in aid or facilitation of the media varies from case to case and may be quite extensive, which is likely the case where the evidence of collaboration is weak or marginal (as discussed further below).

However, this issue raises a further complication related to the scope of the definition of certain law enforcement actions associated with choreographed perp walks to be analyzed, such as those discussed earlier in this footnote. If such law enforcement actions are characterized with specificity as related to facilitation of the media in observing or capturing images of a perp walk, for instance as the use of physical force to facilitate the capturing of images of a suspect by the media, perp parades, and delaying a movement of suspect in custody in aid of the media's ability to view and capture images of the movement, it would be objectively unreasonable (regardless of whether it was considered choreography or collaboration, as discussed above) as a reasonable police officer would unquestionably view such acts as unrelated to the purposes of the legitimate transportation of a suspect in custody or the lawful underlying seizure. It should be noted that in such situations, the specific characterization of relation to facilitation of the media is demonstrated by the facts and circumstances. However, if certain acts associated with choreographed perp walks, such as the ones discussed above, are described with less specificity, for instance as the use of physical force, extending the transportation of a suspect in custody (which occurs in a perp parade), or delaying the transportation respectively, and are not restricted to the context of facilitation of the observation and capturing images of a perp walk by the media, they may occur independently of law enforcement aid to and collaboration with the media and may or may not be reasonable as related to the purposes underlying the legitimate transportation of a suspect in custody or the underlying seizure, depending on the facts and circumstances. For instance, physical force may be used during a perp walk for myriad legitimate reasons, such as gaining control of an unruly detainee and successfully transporting a detainee. Likewise, law enforcement officers may delay a transportation or use a longer route for security concerns. It should be noted that there are some acts associated with choreographed perp walks (largely involving direct contact between law enforcement and the media), such as the providing of information regarding the transport-

tation of a suspect in custody to the media, that appear to be unreasonable under all circumstances.

In such an analysis, the reasonableness determination turns on the facts and circumstances associated with the action as viewed by a reasonable police officer. Whether the action is taken in connection with choreography or collaboration with the media or in aid of the media's observation or obtaining images of a perp walk is, of course, part of such facts and circumstances. That such an action is associated with or constitutes collaboration or collusion with the media would appear determinative because as discussed above, collaboration and collusion are not objectively reasonable. Likewise, under the narrow view of collaboration and related use of force example discussed above, for instance, a reasonable police officer would not consider the performance of such actions associated with choreographed perp walks in the context of law enforcement action in aid of the observation or capture of images of the transportation of a suspect in custody by the press related to the legitimate governmental interest in effecting the transportation of the suspect or the objectives of the lawful underlying arrest or seizure of the suspect.

Put another way, actions, such as the use of physical force during a perp walk or the delay or extension of the transportation of a suspect in custody, that may facilitate the observation and capture of images of the transportation by the press but may be reasonable under certain circumstances are only reasonable where the circumstances are such that a reasonable police officer would consider them related to the purposes of the legitimate transportation of a suspect in custody or the lawful underlying seizure. This is not the case when the action is taken in the context of collaborating with or aiding the press in observing or obtaining images of a perp walk (for instance under the narrow view of collaboration discussed above). In this analysis, all that is required is a showing that a reasonable police officer would consider the action unrelated to legitimate purposes. It need not be demonstrated that a reasonable police officer would consider it taken in an illegitimate context or related to illegitimate purposes, such as collaborating with or aiding the press (although such circumstances can be indicative of unreasonableness). Indeed, actions associated with choreographed perp walks and related conduct but are not necessarily so, such as the use of force during a perp walk, may be unreasonable even if wholly unrelated to collaboration with the media or efforts in aid of the media. It is important to note that the analysis here is an objective one—whether an action such as physical force, delay, or an extended perp walk is reasonable as relating to the purposes of the legitimate transportation of a suspect in custody or the lawful underlying seizure or unreasonable, as unrelated to those purposes, such as being in aid of the media (without any relation to such legitimate purposes), is judged from evaluating the facts and circumstances from the perspective of a reasonable police officer. The subjective intent of officers involved to collaborate with or aid the media is irrelevant.

In sum, regardless of how certain police actions associated with choreographed perp walks, the use of physical force to facilitate the capturing of images of a suspect by the media, perp parades, and delaying a movement of suspect in custody in aid of the media's ability to view and capture images of the movement, are defined or characterized for the purposes of Fourth Amendment analysis, such actions are unreasonable. Both characterizations depend on the facts and circumstances, as is required in Fourth Amendment analysis. Whether such an action meets the narrow characterization described above as performed in facilitation or aid of the media as opposed to related to

law enforcement conduct in transporting a suspect in custody is consistent with routine police practices supports a conclusion that a perp walk was reasonable, as it suggests a legitimate law enforcement purpose for the manner in which it was conducted.⁴¹⁸ In

the purposes of the legitimate transportation of a suspect in custody or the initial seizure is a part of and determined from the facts and circumstances (including, for instance, collaboration which appears to be determinative) which inform the analysis under the broad characterization. The narrow characterization of actions relating to choreographed perp walks merely incorporates general facts and circumstances demonstrating objective unreasonableness such that the action is unreasonable if the characterization is met (and present when the action is taken in choreographed perp walks, collaboration with the media, and related contexts). The actual analysis is the same and leads to the same result.

Nonetheless, the specific facts and circumstances will be of heightened import when analyzing actions associated with choreographed perp walks that may be reasonable in other contexts where evidence of law enforcement collaboration with the media is weak or the collaboration is marginal, such as the situation described above, where a law enforcement officer takes such an action on his own volition without contact with the media. It goes without saying that engaging in actions such as the use of force, delay, and extending a perp walk in the context of aiding or facilitating the ability of the media to observe and acquire images of the perp walk (as they are performed in the context of choreographed perp walks and related conduct) is objectively unreasonable, regardless of whether it is viewed as collaborative. However, where an action associated with choreographed perp walks can be taken reasonably in the context of a nonchoreographed perp walk under certain circumstances, analysis of the specific facts and circumstances is required where the evidence of law enforcement collaboration with the media is weak or the collaboration is marginal to determine whether a reasonable police officer would consider such action related to the purposes of the legitimate transportation of a suspect in custody or the initial seizure (although it augments the ability of the media to observe or capture images of the perp walk). Taking the example discussed above regarding use of force in facilitation of the media on a police officer's own volition without contact with the media resulting in the increased exposure of the suspect to the media, relevant circumstances going to whether the use of force is objectively reasonable (and the attendant issue of whether it was unreasonable as taken in aid of the media) include the presence of the media (especially photographers), the conduct of the suspect (e.g., whether he was resisting, necessitating the use of force), the conduct of the law enforcement officers involved (e.g., telling the suspect to cooperate with the media and allow his face to be photographed and any words between the officers and the media during or after the action), and the amount and type of force used. Thus, the analysis for underlying actions associated with choreographed perp walks that can be reasonable in nonchoreographed perp walks tracks the analysis for any law enforcement action during transportation of a suspect in custody, such as the selection of a door, discussed above and below. However, in evaluating the facts and circumstances, courts may give more scrutiny to actions known to be associated with choreographed perp walks, such as those discussed here.

⁴¹⁸ See *Watkins*, 232 F. Supp. 2d at 760-61. Such evidence is especially relevant to conduct with respect to perp walks which may or may not be reasonable depending on

the circumstances, such as the making of a videotape of the perp walk by law enforcement. A reasonable police officer would not consider the making of a videotape for distribution or exhibition to the press related to the purposes of legitimate transportation of a suspect in custody or the lawful underlying seizure. But as discussed above, the making of a videotape of a perp walk may very well serve such purposes, depending on the context. Routine police practices of making such videotapes and review of them by law enforcement officers, for reasons such as ensuring that proper practices were followed during the perp walk and that the suspect's rights were respected, would weigh in favor of reasonableness. As discussed above, *Wilson* suggests that distribution of the tape to the media would cut against a finding that a reasonable police officer would believe the making of the videotape was reasonable. See generally *Wilson v. Layne*, 526 U.S. 603 (1999).

At first blush, there appears to be some tension between the Supreme Court's indication in *Wilson* that the permissibility of the making of a videotape by law enforcement appears to turn on the purpose for its being made and its statement in *Graham* that the underlying intent of the police officers is not relevant. However, any such tension can be resolved. *Graham* states that the reasonableness analysis should encompass the facts and circumstances confronting the officer viewed through the lens of a reasonable police officer. See *Graham v. Connor*, 490 U.S. 388 (1989). Whether a tape is made for reasons such as internal evaluation or protection of the suspect's rights or for dissemination is part of the facts and circumstances. A reasonable police officer would understand the making of a tape in the former context to be reasonable but to be unreasonable in latter context. *Wilson* appears to endorse evaluation of the circumstances at issue. Indeed, in the context of qualified immunity analysis turning on objective reasonableness of police conduct, the Ninth Circuit has found the subjective intent and purpose of police officers in engaging in particular conduct to be a relevant factual issue where the police conduct would be objectively reasonable if the officers had one purpose in engaging in the conduct but unreasonable if they had another purpose. See *Alexander v. City and Cnty. of S.F.*, 29 F.3d 1355, 1364 (9th Cir. 1994); see also *Branch v. Tunnell*, 937 F.2d 1382, 1385-86 (9th Cir. 1991) (noting the tension between the objective reasonableness standard in qualified immunity cases where the relevant law turns on subjective elements, such as motive or intent, and indicating that consideration of such subjective factors is not precluded in the qualified immunity analysis), *overruled on other grounds* by *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 119 (9th Cir. 2002). Such an approach might be extended from analysis of objective reasonableness in the qualified immunity context to the analysis of objective reasonableness in the context of determining whether law enforcement conduct is violative of the Fourth Amendment, such as the making of a video tape of a perp walk, where the same law enforcement conduct is objectively reasonable if taken for certain purposes but unreasonable if taken for others.

Alternatively, one might simply look to objective evidence of the purpose of the making of the videotape from the circumstances surrounding its making, such as whether it is retained by law enforcement or distributed to the media as relied on in part by the *Wilson* Court, rather than subjective intent of the officers at issue. Alternatively, one might say the intention that is irrelevant would be the more specific intentions to promote the observation and procurement of images of the perp walk and publicization of the perp walk. One might also say that the subjective intention that is irrelevant is whether the officers subjectively intended to harm or embarrass the sus-

most cases, law enforcement decisions in executing the movement of a suspect in custody outside of that to collaborate or collude with the press—such as determining which entrance of a building to lead the suspect through—will be reasonable for the purposes of the Fourth Amendment under the Supreme Court’s reasonable-

pect or believed they were making the videotape for legitimate reasons. Indeed, as discussed above, a reasonable police officer would not consider the making of a videotaped perp walk for distribution or exhibition to the press related to the purposes of the legitimate transportation of a suspect or of the underlying seizure, but would consider videotaping a perp walk by police for reasons such as internal evaluation or protecting the rights of the suspect related to such purposes. The subjective views of officers involved in a given incident are of no importance.

This discussion also has some potential relevance to analysis of certain actions associated with choreographed perp walks that may be broadly characterized as encompassing conduct outside of the context of collaboration with or aiding the media that may be reasonable as discussed in the previous footnote. *See supra* note 417. For instance, one might characterize the use of physical force in facilitating the capture of images of a suspect by the media, perp parades, and delaying a movement of suspect in custody in aid of the media’s ability to view and capture images of the movement, as the use of physical force, delay, and extension of a perp walk for the purpose of facilitating the ability of the media to observe or obtain images of the perp walk. However, even if one were to do so, it should be noted that purpose is less important in such contexts than it is in the making of a videotape. Indeed, evaluation of facts and circumstances surrounding such actions allows for ready objective analysis of whether the circumstances were such that a reasonable police officer would consider such actions related to the purposes underlying the transportation of the suspect in custody or the original seizure or if they were not (for instance, in collaboration or in the context of aiding the media) entirely independent of purpose. For example, the use of physical force causing a suspect to drop his hands in front of the press can very well be objectively reasonable if the suspect is resisting being transported. This counsels against such a characterization of these actions, especially given the objective nature of Fourth Amendment reasonableness. On the other hand, completely divorced from purpose, the making of a videotape of a perp walk is arguably reasonable in nearly any context, as the Supreme Court suggested in *Wilson* that videotaping police conduct may be reasonable as a part of a quality control effort to ensure the rights of suspects (which could potentially justify videotaping every perp walk) and that its reasonableness appears to turn on the purpose of the making of the tape (i.e., quality control and ensuring the rights of suspects instead of publicization). Nonetheless, it should be noted that if the analysis were viewed in the manner discussed in this footnote where purpose may have some role in the objective analysis, as is the case with the making of a videotape of a perp walk, a reasonable police officer would not consider actions such as the use of physical force, delay, or extending the length of the transportation of a suspect in custody taken for the purpose of facilitating the ability of the press to observe or obtain images of a perp walk related to the purposes of the legitimate transportation of a suspect or of the underlying seizure. Hence, the result is the same as if such actions are evaluated as discussed above—they are not reasonable.

ness standard, even if they result in more exposure of the suspect to the press than available alternatives, as they reasonably can be viewed as promoting the successful accomplishment of the transportation.⁴¹⁹

IV. CHOREOGRAPHED PERP WALKS AND RELATED LAW ENFORCEMENT CONDUCT CONSTITUTE UNCONSTITUTIONAL PRETRIAL PUNISHMENT

Despite the above analysis indicating that choreographed perp walks and other law enforcement conduct involving collaboration with media to facilitate the viewing and capturing of images of perp walks by the media, such as the exhibition and distribution of the videotape at issue in *Caldarola*, do not comport with the Fourth Amendment, the perp walk doctrine as articulated by the Second Circuit is well-entrenched in the lower courts, and there has been no indication that courts would be willing to expand it. In fact, several lower courts have suggested in dicta that the Second Circuit's slight restrictions on perp walks are too expansive and that staged perp walks do not violate the Fourth Amendment.⁴²⁰ Although Supreme Court precedent supports a

⁴¹⁹ A police decision to transport a suspect out of one entrance to a building over another, resulting in increased exposure to the press, might be objectively unreasonable under some circumstances, although those circumstances are likely to be few because the reasonableness of such police action is assessed from the vantage point of a reasonable police officer in an unpredictable, rapidly evolving situation where the officer will likely make a quick decision regarding which door to go through, often with limited information about the full circumstances and the presence of the press. However, pieces of evidence pointing toward a conclusion of unreasonableness may include but are not limited to: a greater distance between the entrance where a police vehicle is located, a greater risk to the officers, waiting to move the suspect and then transporting him out of an entrance where the press have gathered, and using a different entrance to move the suspect in and out of a building. However, there are many situations where a reasonable officer would consider these actions to promote the purpose of successfully transporting a suspect (and the objectives of the underlying seizure) reasonable.

⁴²⁰ See *Watkins*, 232 F. Supp. 2d at 758-59 & n.11 (describing *Lauro's* reading of the Fourth Amendment as expansive); *United States v. Edelin*, 76 F. Supp. 2d 1, 4 (D.D.C. 1999) (suggesting that the district court decision in *Lauro* finding that the perp walk at issue violated the Fourth Amendment was wrongly decided).

contrary conclusion,⁴²¹ these courts exclude law enforcement conduct to facilitate the observation and capturing of images of perp walks by the press, such as that which takes place in the context of a choreographed perp walk and the exhibition and distribution of the perp walk videotape at issue in *Caldarola*, from the purview of the Fourth Amendment in large part because, unlike the media ride-alongs that the Court held unconstitutional in *Wilson*, perp walks do not involve invasion of the sanctity of the home, which is accorded special respect by the Fourth Amendment.⁴²²

A potential alternative avenue for courts to restrict indiscriminate perp walks and prevent the harms that they cause for defendants, without repudiating the existing perp walk doctrine, is to evaluate them under the Supreme Court's framework for assessing whether the treatment afforded pretrial detainees constitutes unconstitutional preconviction punishment under the Due Process Clauses of the Fifth and Fourteenth Amendments. This analysis does not entail some of the complications involved in the Fourth Amendment analysis that courts have suggested cut against protections for suspects from perp walks, including differences between invasions of privacy inside the home and those occurring in public places and difficulty in defining the scope of a seizure.⁴²³ No court, on any level, has hitherto examined the issue of whether perp walks constitute unconstitutional preconviction punishment, and only a single commentator has raised this issue.⁴²⁴

This Part examines perp walks in the context of preconviction punishment. First, this Part outlines the Supreme Court's framework for evaluating whether a law enforcement practice toward pretrial detainees constitutes unconstitutional preconviction punishment. Second, this Part applies this analysis in the perp walk context and concludes that staged and choreographed perp walks,

⁴²¹ See *supra* Part III (analyzing perp walks in terms of the Supreme Court's Fourth Amendment jurisprudence).

⁴²² See, e.g., *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 577 (2d Cir. 2003); cf. *Edelin*, 76 F. Supp. 2d at 4.

⁴²³ See *supra* Part III (discussing these issues in Fourth Amendment analysis of perp walks).

⁴²⁴ See Kaiser, *supra* note 3, at 1228-34 (concluding that staged and choreographed perp walks constitute unconstitutional preconviction punishment).

as well as the related law enforcement conduct concerning exhibition and distribution of the videotape to the media at issue in *Caldarola*, may constitute unconstitutional pretrial punishment, at least in some cases. Finally, this Part demonstrates that some other perp walks, including those where law enforcement expresses an intent to punish, shame, or humiliate a suspect, for instance by parading the suspect before the press, also may be classified as unconstitutional preconviction punishment. In this way, the preconviction punishment approach provides greater protection for suspects against perp walks than a Fourth Amendment approach, even the one described in Part III that provides protection against choreographed perp walks and related law enforcement conduct facilitating the exposure of the transportation of a suspect in custody to the media.

*A. The Supreme Court's Framework for Evaluation of
Unconstitutional Preconviction Punishment*

In *Bell v. Wolfish*,⁴²⁵ the Supreme Court articulated its test for identifying unconstitutional punishment at the pretrial stage of a criminal proceeding.⁴²⁶ The *Bell* Court held that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."⁴²⁷ While affirming that the government may detain an individual for the suspected violation of a law to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility, the Court stated that such restrictions may not amount to punishment or otherwise violate the Constitution.⁴²⁸ The Court

⁴²⁵ 441 U.S. 520 (1979).

⁴²⁶ *Id.* at 536.

⁴²⁷ *Id.* at 535-36 (citing *Ingraham v. Wright*, 430 U.S. 651, 671-72 (1977); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-67 (1963); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896)).

⁴²⁸ *See Bell*, 441 U.S. at 536-37. ("[T]he Government concededly may detain [a pre-trial detainee] to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution."); *see also Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004) ("Due process requires that a pretrial detainee not be punished prior to a lawful conviction. . . . However, the government may detain individuals to ensure their presence at trial and may subject them to the

went on to note that “[n]ot every disability imposed during pretrial detention amounts to ‘punishment’ in the constitutional sense.”⁴²⁹ Indeed, the government is entitled to employ devices calculated to effectuate pretrial detention.⁴³⁰ This has traditionally meant confinement resulting in restriction of the movement of a pretrial detainee in a manner in which he would not be restricted if he were free pending trial.⁴³¹ The Court described the purpose of jails or other facilities where pretrial detainees are held as “to detain” and noted that “[l]oss of freedom of choice and privacy are inherent incidents of confinement in such a facility.”⁴³² The fact that pretrial detention “interferes with the detainee’s understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into ‘punishment.’”⁴³³

Given this backdrop, the *Bell* Court noted the “distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may.”⁴³⁴ The Court then enumerated multiple factors “provid[ing] useful guideposts in determining whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word”.⁴³⁵

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to

conditions and restrictions of the detention facility so long as those conditions and restrictions do not amount to punishment.”).

⁴²⁹ *Bell*, 441 U.S. at 537.

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.* at 538.

the alternative purpose assigned are all relevant to the inquiry.⁴³⁶

The Court acknowledged that these factors may often point in different directions.⁴³⁷

However, the Court focused on the last two factors listed above in articulating the nature of the framework for determining whether a condition or restriction imposed upon a pretrial detainee constitutes impermissible pretrial punishment.⁴³⁸ In determining whether a particular restriction or condition accompanying pretrial detention constitutes punishment in the constitutional sense and is thus prohibited, "[a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose."⁴³⁹ The Court further prescribed:

Absent a showing of an expressed intent to punish on the part of [law enforcement officers], that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."⁴⁴⁰

⁴³⁶ *Id.* at 537-38 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

⁴³⁷ *Id.* at 538 (quoting *Kennedy*, 372 U.S. at 168-69).

⁴³⁸ See *Union Cnty. Jail Inmates v. Di Buono v. Fauver*, 713 F.2d 984, 991 (3d Cir. 1983) (stating that the Supreme Court in *Bell* focused primarily on the last two factors enumerated in *Kennedy*).

⁴³⁹ *Bell*, 441 U.S. at 538 (citing *Flemming v. Nestor*, 363 U.S. 603, 613-17 (1960)); see *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004) ("The determination of whether a condition of pretrial detention amounts to punishment turns on whether the condition is imposed for the purpose of punishment or whether it is incident to some legitimate government purpose." (citing *Bell*, 441 U.S. at 538)).

⁴⁴⁰ *Bell*, 441 U.S. at 538 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)). The *Bell* Court indicated that a measure constitutes punishment in the pretrial detention context if it is taken for the purpose of punishment. See *id.* In support of this proposition, the Court remarked that "[t]he fact that harm is inflicted by governmental authority does not make it punishment" and that "[f]iguratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed, [b]ut there may be reasons other than punitive for such deprivation." *Id.* at 538 n.19 (Frankfurter, J., concurring) (quoting *United States v. Lovett*, 328 U.S. 303, 324 (1946)).

Under this framework, “if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to ‘punishment.’”⁴⁴¹ However, “[c]onversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.”⁴⁴²

The Court further elaborated on the contours of the analysis, emphasizing that nothing in the framework it articulated permitted law enforcement officers to justify punishment of a pretrial detainee.⁴⁴³ Rather, “in the absence of a showing of intent to pun-

⁴⁴¹ *Id.* at 539. Based on this language, the *Bell* approach has been referred to as the “reasonable relationship” test for determining whether a measure is punitive. See *Stevenson v. Carroll*, 495 F.3d 62, 67 (3d Cir. 2007) (“The *Bell* Court mandated a pragmatic approach to determining what constitutes punishment, and formulated the ‘reasonable relationship’ test for determining whether a restriction is punitive.”). In its analysis in *Bell*, the Supreme Court focused on the purpose of the act (i.e., whether it was taken for the purpose of punishment) implicated by the last two factors it enumerated as relevant to the determination of whether a governmental act is punitive, factors it enumerated as relevant to the determination of whether a governmental act is punitive and did not make clear the precise role of the other factors in the analysis.. While the Court’s statement that a court must decide whether a disability is imposed for the purpose of punishment could be interpreted as excluding the other factors from the analysis, its statement based on the last two enumerated factors that “[a]bsent a showing of an expressed intent to punish . . . th[is] determination generally will turn on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]” indicates that other factors may be relevant because of the use of the term “generally.” *Bell*, 441 U.S. at 538 (internal quotation marks and citations omitted). Likewise, the Court’s statement that in this analysis, a condition reasonably related to a legitimate governmental objective “does not, without more, amount to ‘punishment,’” *id.* at 539, suggests that additional factors might render a condition reasonably related to a legitimate governmental action punishment. Indeed, authorities interpreting *Bell* have found that the enumerated factors in *Bell* are relevant to aid courts in applying this “reasonable relationship” test derived from the last two factors. See *Stevenson*, 495 F.3d at 67; see also *Demery v. Arpaio*, 378 F.3d 1020, 1036-37 (2004) (Bea, J., dissenting) (indicating that the “more” that can render a measure rationally related to a legitimate governmental purpose can be derived from the enumerated list of factors). Furthermore, an express intent to punish might also be viewed as an example of what constitutes the “more” that is required to render a restriction reasonably related to a legitimate objective punishment.

⁴⁴² *Bell*, 441 U.S. at 539.

⁴⁴³ *Id.* at 539 n.20.

ish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective."⁴⁴⁴ The Court definitively stated that "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives."⁴⁴⁵ Then, the Court illustrated the rule that measures that were excessive in relation to a legitimate purpose to which they relate constitute punishment by way of example, noting that "loading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution."⁴⁴⁶ The Court went on to state that "it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so may [sic] alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish."⁴⁴⁷ While the Court expressly did not detail the precise extent of the legitimate governmental interests that may justify conditions or restrictions of pretrial detention, it recognized that in addition to ensuring a pretrial detainee's presence at trial, the effective management of the facility in which a detainee is detained, including the maintenance of order and security at the institution and preventing weapons and illegal drugs from reaching pretrial detainees, is a valid objective that may justify the imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.⁴⁴⁸

Furthermore, *de minimis* imposition of pretrial punishment does not implicate constitutional rights.⁴⁴⁹ In *Block v. Ruther-*

⁴⁴⁴ *Id.* (citing *Kennedy*, 372 U.S. at 168; *Flemming*, 363 U.S. at 617).

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.* at 540.

⁴⁴⁹ *Id.* at 539 n.21 ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." (quoting *Ingraham v. Wright*, 430 U.S. 651, 674 (1977))). Accordingly, a measure that would otherwise constitute unconstitutional pretrial punishment under *Bell*, such as one imposed with an express intent to punish, one that is not reasonably related to a legitimate governmental purpose, or one that is excessive in relation to a legitimate governmental purpose it is reasonably related to, that is *de minimis* in nature is not unconstitutional pretrial punishment.

ford,⁴⁵⁰ the Supreme Court reaffirmed the framework set forth in *Bell*, noting that *Bell* “outlined the principles to be applied in evaluating the constitutionality of conditions of pretrial detention.”⁴⁵¹

The Court’s holding in *Bell* can be summarized as follows—the determination of whether a condition of pretrial detention constitutes impermissible pretrial punishment turns on whether the condition is imposed for the purpose of punishment or whether it is incident to some legitimate governmental purpose. A condition of pretrial detention is imposed for the purpose of punishment—and thus constitutes improper pretrial punishment—if it is imposed with an express intent to punish, is not reasonably related to a legitimate governmental purpose, or is excessive in relation to such a purpose it is related to.⁴⁵² Indeed, some circuit courts have

⁴⁵⁰ 468 U.S. 576 (1984).

⁴⁵¹ *Id.* at 584; see also *Jones v. Horne*, 634 F.3d 588, 598 (D.C. Cir. 2011) (“The Court reaffirmed these principles in *Block v. Rutherford* . . .”).

⁴⁵² In the latter two situations, the *Bell* Court indicated that a purpose of punishment may be inferred. *Bell*, 441 U.S. at 539. *Daniels v. Williams*, 474 U.S. 327 (1986), and its companion case, *Davidson v. Cannon*, 474 U.S. 344 (1986), Supreme Court cases subsequent to *Bell*, holding that mere negligence on the part of a state actor in the prison context was insufficient to make out a constitutional violation, have been said to limit the holding of *Bell* to exclude conditions caused by negligent conduct from the scope of pretrial punishment under *Bell*. See *Broussard v. Parish of New Orleans*, 318 F.3d 644, 658 n.69 (5th Cir. 2003) (“We have recognized the subsequent limits placed on *Bell* by the Supreme Court with regard to the level of culpability required to find a due process violation.” (citing *Ortega v. Rowe*, 796 F.2d 765, 767-68 (5th Cir. 1986))); *Ortega*, 796 F.2d at 768 (“Only if the evidence suggests that the appellees knew of the jails’ conditions, or intended to force the detainees to endure such conditions, would a *Bell* analysis retain vitality.”); Kaiser, *supra* note 3, at 1231 (indicating that plaintiffs seeking relief from unconstitutional pretrial punishment must prove at least tortious recklessness to claim due process violations). Indeed, the Seventh Circuit has indicated that the *Bell* analysis applies in the context of intentional conduct. See *Tesch v. Cnty. of Green Lake*, 157 F.3d 465, 475 (7th Cir. 1998) (“[A]n appropriate *Bell* test case starts with the assumption that the State intended to cause the pretrial detainee’s alleged constitutional deprivation.”). Moreover, the Third Circuit has noted that “[t]he Court in *Bell* did not explicate the requisite mental element, presumably because the challenged actions . . . were unquestionably performed intentionally.” *Burton v. Kindle*, 401 F. App’x 635, 638 (3d Cir. 2010) (per curiam) (unpublished opinion). The Third Circuit went on to note that “[t]he [*Bell*] Court provided a standard to assess whether a prison official intended for a condition to serve as punishment, . . . but this question is separate from the preliminary issue of whether the official actually intended to impose that condition.” *Id.* at 638 n.1. However, the Third Circuit has also stated that *Bell* “allowed for an inference of mens rea where the restriction is arbitrary or purposeless,

endorsed the following distillation of the holding in *Bell*: “[A] particular measure amounts to punishment when there is a showing of express intent to punish . . . when the restriction or condition is not rationally related to a legitimate non-punitive government purpose, or when the restriction is excessive in light of that purpose.”⁴⁵³ Consistent with the language of *Bell* itself set forth above, including that indicating that the seminal question in the pretrial punishment analysis is whether a measure is imposed for the purpose of punishment or whether it is an incident of some other legitimate governmental purpose and suggesting that the analysis would turn on an expressed intent to punish, and the view of the holding of *Bell* discussed in this paragraph, the Eleventh Circuit has stated that “[a]n intent to punish . . . is sufficient to show unconstitutional pretrial punishment.”⁴⁵⁴ Indeed, courts have found that “[a] showing of an express intent to punish . . . is in itself determinative that the condition of detainment under review rises to the level of punishment” and thus violates the constitutional right to be free of pretrial punishment.⁴⁵⁵

or where the restriction is excessive, even if it would accomplish a legitimate governmental objective.” *Stevenson v. Carroll*, 495 F.3d 62, 68 (3d Cir. 2007). Furthermore, one commentator has noted that the claims at issue in *Daniels* and *Davidson* did not focus on direct actions taken by prison officials, but on violations of duties of care toward prisoners, rendering their effect on actions directed toward detainees minimal. See Kaiser, *supra* note 3, at 1231.

⁴⁵³ *Rapier v. Harris*, 172 F.3d 999, 1005 (7th Cir. 1999); accord *Stevenson*, 495 F.3d at 68 (quoting *Rapier*, 172 F.3d at 1005).

⁴⁵⁴ *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004); accord *McMillan v. Johnson*, 88 F.3d 1554, 1564 (11th Cir. 1996) (“[A] showing of intent to punish suffices to show unconstitutional pretrial punishment.”). Consistent with the analysis set forth in *Bell*, the Eleventh Circuit also noted that “[a]n intent to punish may be inferred when a condition of pretrial detention is not reasonably related to a legitimate governmental goal” or when the condition “is excessive in relation to the legitimate purpose assigned to it.” *McMillan*, 88 F.3d at 1564. Indeed, the *Bell* Court’s statement that the pretrial punishment analysis generally turns on whether an alternative purpose to which a measure may be rationally connected is assignable to it and whether the measure appears excessive to such an alternative purpose “[a]bsent a showing of an expressed intent to punish” indicates that the pretrial punishment analysis would turn on a showing of an expressed intent to punish. 441 U.S. at 538.

⁴⁵⁵ *Tirone v. Trella*, No. 03-257, 2007 U.S. Dist. LEXIS 79812, at *9 (D.N.J. Oct. 29, 2007); see also *Michel v. McGettigan*, No. 07-2069, 2008 U.S. Dist. LEXIS 90202, at *9 n.2 (D.N.J. Nov. 5, 2008) (“Finding an express intent to punish is determinative of a Fourteenth Amendment violation under the Third Circuit’s interpretation of the *Bell* precedent. . . . Failing such a proof, the Court will then turn to the requirement under

There is at least some case law that reads a separate and express requirement that the governmental action at issue cause the detainee to suffer some harm or disability in addition to the requirements discussed above.⁴⁵⁶ One such case is the Ninth Circuit

Bell of determining when the restriction or condition is not rationally related to a legitimate non-punitive government purpose, or when the restriction is excessive in light of that purpose.” (internal quotation marks and citations omitted)). Of course, given the Supreme Court’s indication in *Bell* that the Constitution does not provide protection against *de minimis* impositions, an act taken with the intent to punish that constitutes a *de minimis* imposition on a pretrial detainee does not constitute pretrial punishment.

⁴⁵⁶ See *Slade v. Hampton Rds. Reg’l Jail*, 407 F.3d 243, 251 (4th Cir. 2005) (“Under th[e *Bell*] standard, the detainee first must show the imposition of a particular ‘disability.’” (citing *Bell*, 441 U.S. at 538)); *Demery v. Arpaio*, 378 F.3d 1020, 1029 (9th Cir. 2004) (“For a particular governmental action to constitute punishment, (1) that action must cause the detainee to suffer some harm or ‘disability,’ and (2) the purpose of the governmental action must be to punish the detainee.” (citing *Bell*, 441 U.S. at 538 (“A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.”))). The Ninth Circuit in *Demery* undoubtedly derives its harm or disability requirement from the *Bell* Court’s language indicating that a court must decide if the disability is imposed for the purpose of punishment it cited to support this proposition. Likewise, without providing a quotation, the Fourth Circuit in *Slade* cited to the same page in *Bell* as support for this proposition. However, in language discussed above immediately preceding and following the sentence pointed to by the Ninth Circuit in *Demery*, the *Bell* Court uses the terms “restriction” and “condition” rather than “disability” in describing the governmental measure subject to the analysis. *Bell*, 441 U.S. at 538. The *Bell* Court did not expressly create a separate harm or disability requirement, and the language relied on by the *Demery* court does not appear to do so. Although the Court did indicate that the subject of the analysis was a “disability” in this passage, it did not create a specific or express requirement that a governmental action or a condition or restriction of confinement impose a disability. However, as discussed below, the *Bell* Court prescribed that a *de minimis* imposition on a pretrial detainee does not rise to the level of unconstitutional pretrial punishment, raising the implication that there must be a harm or disability in the sense that the imposition imposed on the pretrial detainee is more than *de minimis* for unconstitutional pretrial punishment to occur. See *supra* note 449-51 and accompanying text.

However, the express requirement of a harm or disability set forth by the Ninth Circuit in *Demery* and the Fourth Circuit in *Slade* appears to be in at least some conflict with the approach taken by the Eleventh Circuit described above, where an intent to punish is sufficient to show unconstitutional pretrial punishment in the context of conditions of pretrial detention. See *Magluta*, 375 F.3d at 1273; *supra* note 454 and accompanying text. Likewise, the approach to the *Bell* analysis taken by the Third and Seventh Circuits embodied in the summary of the *Bell* holding set forth in their cases discussed above defining when a measure amounts to punishment includes no separate and express requirement that the measure create a harm or disability. Indeed, at least one district court has found that an express intent to punish is determinative under the Third Circuit’s interpretation of *Bell*, see *Michel*, 2008 U.S. Dist. LEXIS 90202, at *9

n.2, a view that as discussed above, is in at least some conflict with an additional separate harm or disability requirement. Likewise, other circuit courts (and the vast majority of cases) applying and summarizing the pretrial punishment analysis set forth in *Bell* have not imposed an express and distinct requirement that an action must cause a harm or disability to constitute pretrial punishment on top of the determination of whether it is taken for the purpose of punishment. See, e.g., *Jones*, 634 F.3d at 597-98; *Morris v. Zefferi*, 601 F.3d 805, 810 (8th Cir. 2010); *Taylor v. Comm'r of N.Y. Dep't. of Corrs.*, 317 F. App'x 80, 81-82 (2d Cir. 2009) (per curiam) (unpublished opinion); *Leary v. Livingston Cnty.*, 528 F.3d 438, 451 (6th Cir. 2008); *United States v. Budd*, 496 F.3d 517, 530 (6th Cir. 2007); *Collazo-Leon v. U.S. Bureau of Prisons*, 51 F.3d 315 (1st Cir. 1995); *Lareau v. Manson*, 651 F.2d 96, 103 (2d Cir. 1981). Indeed, the Ninth Circuit itself has not consistently imposed a separate requirement of harm or disability in the *Bell* pretrial punishment analysis, and *Demery* appears to be the only case in which it has done so. In *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004), a case dealing with civil rather than pretrial detainees, the Ninth Circuit cited and quoted *Demery* for its approach to determining whether a condition is punitive under *Bell* with no mention of a separate or express harm or disability requirement. *Id.* at 932 ("Following *Bell*, we have recognized that punitive conditions may be shown (1) where the challenged restrictions are expressly intended to punish, or (2) where the challenged restrictions serve an alternative, non-punitive purpose but are nonetheless excessive in relation to the alternative purpose, or are employed to achieved objectives that could be accomplished in so many alternative and less harsh methods." (quoting *Demery*, 378 F.3d at 1028; *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1484 (9th Cir. 1993)) (internal quotation marks and citations omitted)). Indeed, the viability of the separate harm or disability requirement might be called into question by the Ninth Circuit's en banc opinion in *Byrd v. Maricopa Cnty. Sherriff's Dep't*, 629 F.3d 1135 (9th Cir. 2011) (en banc), decided after *Demery*, but making no mention of it or a separate harm or disability requirement in applying the *Bell* pretrial punishment analysis. *Id.* at 1140. Likewise, in *Pierce v. Cnty. of Orange*, 526 F.3d 1190 (9th Cir. 2008), the Ninth Circuit did not mention a separate or distinct harm or injury requirement in setting forth the pretrial punishment analysis, but cited *Demery* and quoted the *Demery* court's language regarding the type of harm or disability it viewed as required to constitute punishment to support a proposition going to the inference of punitive intent (which is not a part of the harm or disability requirement in *Demery*). *Id.* at 1205. Moreover, Ninth Circuit cases prior to *Demery* dealing with the issue of pretrial punishment analysis under *Bell* also do not impose an express and separate harm or disability requirement. See, e.g., *Valdez v. Rosenbaum*, 302 F.3d 1039, 1045 (9th Cir. 2002) (indicating that the substantive due process rights of pretrial detainees to avoid pretrial punishment are violated if restrictions are imposed for the purpose of punishment); *White v. Roper*, 901 F.2d 1501, 1504 (9th Cir. 1990). In the same vein, prior Fourth Circuit cases cited in *Slade* make no mention of a discrete disability requirement. See *Robles v. Prince George's Cnty.*, 302 F.3d 262, 269 (4th Cir. 2002); *Hill v. Nicodemus*, 979 F.2d 987, 991 (4th Cir. 1992); *Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988). While there appears to be no authority reconciling or analyzing case law setting forth an express disability or harm requirement and that focusing exclusively on punitive purpose for the determination of whether a governmental action toward a pretrial detainee constitutes pretrial punishment, as discussed above and below, perhaps such a requirement can be viewed as merely embodying the *Bell* Court's requirement that the level of im-

case *Demery v. Arpaio*,⁴⁵⁷ which elaborates on the contours of such a requirement. The Ninth Circuit in *Demery* stated that “to constitute punishment, the harm or disability caused by the government’s action must either significantly exceed, or be independent of, the inherent discomforts of confinement.”⁴⁵⁸ However, the

position on a pretrial detainee must be more than *de minimis* to constitute unconstitutional pretrial punishment. 441 U.S. at 539 n.21. Indeed, circuit court case law acknowledges that the injury resulting from governmental actions must be more than *de minimis* to constitute pretrial punishment. See, e.g., *Budd*, 496 F.3d at 530 (“[D]e minimis injuries do not support a constitutional violation, even if intentionally inflicted.”); *Robles*, 302 F.3d at 269 (indicating that the injury resulting from government actions must be more than *de minimis* for there to be a constitutional violation for pretrial punishment). Indeed, although the Third Circuit has not imposed an express and separate harm or disability requirement, and as discussed above, an express intent to punish has been found determinative under the Third Circuit’s approach to *Bell*, the Third Circuit has indicated that a deprivation must be “sufficiently serious” to constitute unconstitutional punishment in the context of pretrial detainees. See *Stevenson*, 495 F.3d at 68. Given that the Third Circuit in *Stevenson* provided no guidance as to what constituted a “sufficiently serious” deprivation, this statement can be viewed as an acknowledgement of the *Bell* Court’s requirement that unconstitutional pretrial punishment must be more than *de minimis*, which is not mentioned in the *Stevenson* opinion, especially given the primacy of *Bell* and the interpretation of it in the *Stevenson* court’s analysis. This view is supported by district court authority referenced above citing *Stevenson* for the proposition that an express intent to punish is determinative of a due process violation under the Third Circuit’s interpretation of *Bell*. See *Michel*, 2008 U.S. Dist. LEXIS 90202, at *9 n.2 (citing *Stevenson*, 495 F.3d at 68).

⁴⁵⁷ 378 F.3d 1020 (9th Cir. 2004).

⁴⁵⁸ *Id.* at 1030 (“Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee’s understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into punishment.” (citing *Bell*, 441 U.S. at 537) (internal quotation marks omitted)). The Ninth Circuit appears to over read the passage from *Bell* that it quotes to support this proposition. The passage does not state a harm or disability caused by a governmental measure must significantly exceed or be independent of the inherent discomforts of confinement. Rather, the passage merely states that the fact that detention interferes with comfort and imposes restraint does not convert the conditions or restrictions of detention into punishment. It says nothing with respect to the magnitude of an imposition or the magnitude of the imposition as compared to permissible impositions for that imposition to constitute punishment. Indeed, under the framework set forth in *Bell*, the magnitude of the imposition of a measure on a pretrial detainee functions in the analysis in one of two ways: (1) a *de minimis* imposition does not rise to the level of unconstitutional pretrial punishment, and (2) a measure that is excessive with respect to a non-punitive legitimate governmental purpose does constitute unconstitutional pretrial punishment. Likewise, it does not speak to whether a harm must be independent of or unrelated to permissible harms to constitute pretrial punishment. Rather, *Bell* focuses on whether the purpose of a measure is unrelated or

excessive with respect to a legitimate non-punitive purpose. Contrary to the Ninth Circuit's rule that a harm or disability must significantly exceed or be independent of the inherent discomforts of confinement, a requirement that the detainee suffer some harm or disability for pretrial punishment to occur might be interpreted as meaning simply that the imposition on or harm to a detainee from a governmental action or measure must be more than *de minimis*, consistent with the *Bell* Court's prescription to this effect. There is a hint of such a view in the Fourth Circuit's opinion in *Slade*, which acknowledged that "there is . . . a *de minimis* level of imposition with which the Constitution is not concerned" in expressly refusing to decide whether the measure at issue was a disability. 407 F.2d at 251 (quoting *Ingraham v. Wright*, 430 U.S. 651, 674 (1977)).

Moreover, the Ninth Circuit's rule in *Demery* that the harm or disability caused by the government's action must either significantly exceed, or be independent of the inherent discomforts of confinement may often collapse into the second requirement for pretrial punishment set forth in *Demery*—that the purpose of the governmental action be punishment. This second requirement for pretrial punishment advanced by the Ninth Circuit in *Demery* (the first being the requirement of a harm or disability) tracks the pretrial punishment analysis expressly set forth in *Bell*. Indeed, in *Pierce*, a case where the court made no mention of a separate requirement of a harm or disability and described the pretrial punishment analysis as "generally turn[ing] on whether an alternate purpose is reasonably assignable" and quoting *Bell* to set forth the framework described above, 526 F.3d at 1205, the Ninth Circuit cited *Demery* and quoted its requirement that the harm or disability significantly exceed or be independent of the inherent discomforts of confinement to support the proposition that "it may be possible to infer a given restriction's punitive status 'from the nature of the restriction.'" 526 F.3d at 1205 (quoting *Valdez*, 302 F.3d at 1045) (citing *Demery*, 378 F.3d at 1030). In *Valdez*, which is quoted by *Pierce*, the Ninth Circuit stated that "whether punitive intent can be inferred from the nature of the restriction" generally turns on whether an alternative purpose to which may rationally be connected is assignable for it, and whether the restriction appears excessive in relation to the alternative purpose assigned to it. *Valdez*, 302 F.3d at 1045-46. Thus, *Pierce* suggests that the requirement articulated in *Demery* that the harm or disability must significantly exceed or be independent of the inherent discomforts of confinement goes to the issue of whether punitive intent, which is part and parcel with punitive status, can be inferred from the nature of a restriction and thus is part of the analysis under the second requirement in *Demery*, punitive purpose, rather than a separate requirement relating to a harm or disability.

In *Demery*, the Ninth Circuit appears to consider a harm to significantly exceed the inherent discomforts of confinement when a certain quantum of additional impact on detainees above that inherent in confinement is felt. However, it provides no express guidance as to when a harm or disability significantly exceeds or is independent of the inherent discomforts of confinement (outside of finding the standard to be met where the intrusion was greater by several orders of magnitude) and the relationship of this analysis with that under the second requirement for punishment articulated in that case—whether the action is taken for the purpose of punishment. Under *Bell*, in the absence of an express intent to punish, this second requirement turns on whether the measure is unrelated to or excessive with respect to a legitimate governmental objective. It is beyond peradventure that any imposition that is inherent in pretrial deten-

tion is rationally related to a legitimate non-punitive governmental purpose. Likewise, it is difficult to envision a scenario where a harm that significantly exceeds or is independent of the inherent discomforts of confinement would be rationally related to or not excessive with respect to a legitimate non-punitive governmental purpose for the purpose of pretrial punishment. This is especially the case given that the *Demery* court has indicated that a governmental purpose that is unrelated to the purposes of pretrial detention is insufficient to support a governmental practice in the pretrial punishment analysis. See *supra* note 456 and accompanying text. This reasoning also appears to foreclose an argument that there are legitimate non-punitive governmental purposes that can cause harms or disabilities significantly exceeding or independent of the inherent discomforts of confinement. Furthermore, given the Supreme Court's focus in *Bell* on whether an action is taken for the purpose of punishment and its insistence that conditions of pretrial detention may not constitute punishment, the harm or disability caused by an action that is unrelated to or excessive with respect to a legitimate non-punitive governmental purpose would likely significantly exceed or be independent of the discomforts inherent in confinement. The *Bell* Court found that confinement and the discomforts associated with it do not constitute punishment and are permissible. Indeed, even if an action that is unrelated or excessive, with respect to legitimate non-punitive governmental purposes, leads to harm that is only slightly greater (although to a degree great enough so as not to be *de minimis*) than the discomforts inherent in pretrial confinement, such an action can still be said to be independent of the inherent discomforts of pretrial confinement even though it might not lead to harm or disability that significantly exceeds the inherent discomforts of pretrial confinement. In this way, the Ninth Circuit's elaboration on the separate harm or disability requirement set forth in *Demery*, in terms of the type of harm or disability required to constitute punishment, collapses into the second requirement articulated in *Demery*, that the measure be undertaken for the purpose of punishment (which is the framework for determining whether a measure constitutes punishment as articulated in *Bell*). Thus, the Ninth Circuit's standard for determining whether a harm or disability is sufficient to satisfy its harm or disability requirement for pretrial punishment can be said to provide little actual guidance with respect to what constitutes a harm or disability beyond a measure that meets its second requirement, one that is performed for the purpose of punishment. Accordingly, it can be argued that the harm or disability requirement as characterized by the Ninth Circuit in *Demery* provides no more stringent a test than the one expressly set forth in *Bell* and relied on by other circuits that omits any express requirement of a harm or disability (other than the measure cause a harm that is more than *de minimis*) and focuses on whether an action is performed for the purpose of punishment.

At first blush, the *Demery* bipartite approach to pretrial punishment, specifically requiring a disability significantly exceeding or independent of the inherent discomforts of confinement, may seem to diverge the most from an approach without such a requirement in the context of actions taken for the express purpose of punishment. In the absence of such a requirement, any act taken for the purpose of punishment, even one that is ordinarily part of the inherent discomforts of confinement, constitutes pretrial punishment, whereas under *Demery*, only acts taken for the express purpose of punishment that cause harm that significantly exceed or are independent of the inherent discomforts of confinement constitute pretrial punishment. However, the reasoning above is equally applicable for cases involving express intent to punish. There is a good

Ninth Circuit made it clear that to constitute punishment, a harm need not be "independently cognizable as a separate constitutional violation (e.g., a deprivation of First Amendment rights, or a violation of a constitutional right to privacy)."⁴⁵⁹

B. Application of Pretrial Punishment Standards to Staged and Choreographed Perp Walks and Related Cases

Choreographed and staged perp walks and related law enforcement conduct in collusion with the press to facilitate the press obtaining images of a perp walk, such as the exhibition and distribution of the videotape of the perp walk at issue in *Caldarola*, constitute unconstitutional pretrial punishment under the analysis set forth in *Bell*. Choreographed and staged perp walks and related cooperation and collusion with the press by law enforcement are often conducted with the express purpose of punishment and, under the analysis set forth in *Bell*, are conducted for the purpose of punishment as they are not reasonably related to or are excessive in relation to any non-punitive legitimate governmental purpose.⁴⁶⁰

argument that actions taken with the express purpose of punishment are not inherent in the discomforts of pretrial confinement and thus are independent of (and likely significantly exceed) the inherent discomforts of pretrial confinement, given the Supreme Court's focus on the determination of whether an action is taken for the purpose of punishment in *Bell* in determining if it constitutes pretrial punishment and its prescription that conditions of pretrial detention cannot amount to punishment, as discussed above. Thus, even an action taken for the purpose of punishment that has a relatively small (although greater than *de minimis*) effect can be said to be independent of the inherent discomforts of confinement even if it is not significantly greater than such discomforts.

However, as discussed below, there is a nontrivial counterargument against the collapse of the two *Demery* requirements in certain cases. See *infra* note 534.

⁴⁵⁹ *Demery*, 378 F.3d at 1030.

⁴⁶⁰ It is beyond peradventure that conduct in connection with perp walks, such as the transportation of a suspect in custody; decisions made by law enforcement personnel in effecting the transportation of a suspect in custody, such as doors and the route used; and collusive conduct with the press, such as those that are involved in choreographed and staged perp walks and related law enforcement conduct, are intentional actions amenable to *Bell* analysis. See *supra* note 456.

Pretrial detention necessarily involves some discomfort and loss of freedom of choice and privacy.⁴⁶¹ For instance, pretrial detention necessarily involves the discomfort associated with being observed by staff and other inmates while a suspect is held at a jail or other detention facility.⁴⁶² Likewise, discomfort and disability from being transported in public is also inherent in pretrial detention and incident to legitimate governmental purposes. The most notable harm caused by a perp walk is that it engenders a powerful image of the suspect's guilt, which is broadcast to the public.⁴⁶³ In a perp walk, a suspect is said to be "walking guilty," often in handcuffs and prison garb or perhaps in shackles or a bullet-proof vest, which evokes an even stronger image of guilt.⁴⁶⁴ Thus, perp walks create discomfort as they humiliate the suspect by presenting him to the public as guilty and subjecting him to public scorn and ridicule by allowing his friends, family, and acquaintances to see him in this condition.⁴⁶⁵ Perp walks generate disability for and are an imposition on the suspect inasmuch as they erode the presumption of innocence and taint the jury pool by showing a suspect who has merely been accused of a crime as guilty.⁴⁶⁶ As discussed above, perp walks resulting from legitimate movements of a suspect in custody, such as going to a court appearance from jail and the return trip, serve legitimate govern-

⁴⁶¹ *Bell*, 441 U.S. at 537; see also *Demery*, 378 F.3d at 1030 ("[A]ny pretrial detention inherently involve[s] some discomfort.").

⁴⁶² See *Demery*, 378 F.3d at 1030.

⁴⁶³ See, e.g., *Lauro v. Charles*, 219 F.3d 202, 204 (2d Cir. 2000); *Kaiser*, *supra* note 3, at 1228.

⁴⁶⁴ See *Kaiser*, *supra* note 3, at 1228.

⁴⁶⁵ See, e.g., *id.*; Guillermo "Junior" Malave, *On the Perp Walk; Echoe from the Street*, HARTFORD COURANT, Sept. 30, 2001, at 1.1.

⁴⁶⁶ See, e.g., *Lauro*, 219 F.3d at 204; *Kaiser*, *supra* note 3, at 1228. No court has hitherto reversed a criminal conviction on the ground of prejudicial pretrial publicity stemming from an unconstitutional perp walk. The only published opinion addressing this issue emphatically rejected this possibility, holding that "[v]acating [a] conviction and sentence would not be a suitable sanction for any governmental misconduct in staging a 'perp walk.'" *United States v. McVeigh*, 118 F. Supp. 2d 1137, 1154 (D. Colo. 2000). Indeed, the prejudice engendered by media coverage of an unconstitutional perp walk could easily be abated by excluding veniremen who were exposed to such coverage during *voir dire*. See generally *LAFAYETTE ET AL.*, *supra* note 186, § 23.2(f) (describing the role of *voir dire* in overcoming the prejudicial impact of pretrial publicity by identifying and removing prospective jurors who were influenced by it).

mental purposes and are inherent in pretrial detention. Thus, in the absence of collusion between law enforcement and the press, courts would likely consider such transportations of suspects—and the attendant opportunity for the press to observe the suspect while in custody and capture his image—incidental to legitimate pretrial detention and legitimate governmental purposes. Likewise, a court would not consider such perp walks excessive with respect to such purposes, given that transportation of suspects in custody through public places necessarily entails exposure to the public and the press and the strong governmental interest in transportation of suspects in custody and prevention of escape. Accordingly, such perp walks are not conducted for the purpose of punishment and do not constitute unconstitutional pretrial punishment under *Bell*.⁴⁶⁷

However, choreographed and staged perp walks, as well as related law enforcement conduct in collusion with the press to facilitate the press's obtaining of images of a perp walk, such as the exhibition and distribution of the videotape of the perp walk at issue in *Caldarola*, are a different matter. Under the analysis set forth in *Bell*, choreographed and staged perp walks and related cooperation and collusion with the press by law enforcement are conducted for the purpose of punishment and thus constitute unconstitutional pretrial punishment. Indeed, choreographed and staged perp walks and related conduct are often conducted with an express intent to punish.

Moreover, as discussed above, in the absence of an express intent to punish, the determination of whether a government practice causing discomfort for pretrial detainees constitutes punishment usually turns on whether the practice is rationally connected to or the incident of a legitimate government purpose.⁴⁶⁸ In this analysis, "if a particular condition or restriction of pretrial

⁴⁶⁷ This is not the case when law enforcement officers engage in conduct during the transportation of suspects in custody with the express intent to punish, shame, or humiliate the suspect. See *infra* Part IV.C. It should be noted that a legitimate transportation of a suspect in custody in and of itself is not conducted for the purpose of punishment because it is conducted for the purpose of legitimately moving the suspect. Law enforcement officers, however, can engage in specific conduct for the purpose of punishment in carrying out a legitimate transportation of a suspect. See *id.*

⁴⁶⁸ See *supra* note 440 and accompanying text.

detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment."⁴⁶⁹ However, government conduct that is not rationally connected to non-punitive purposes is considered punitive.⁴⁷⁰ As discussed above, analysis of staged and choreographed perp walks as well as other acts taken in collusion or collaboration with the media in facilitating the media's observation and obtaining of images of a perp walk, such as the exhibition and distribution of a videotape of a perp walk to the press as occurred in *Caldarola*, under the Fourth Amendment, reveals that they serve no legitimate purpose.⁴⁷¹ Indeed, staged and choreographed perp walks and other law enforcement actions in collaboration with the media in facilitating the media's observation and obtaining images of a suspect in custody are wholly unrelated to the objectives found to support restrictions on pretrial detainees in *Bell*—ensuring a pretrial detainee's presence at trial, the effective management of the facility in which a detainee is detained, including the maintenance of order and security at the institution and preventing weapons and illegal drugs from reaching pretrial detainees.

However, a valid counterargument stems from the assertion that the spectrum of legitimate purposes is broader in the pretrial punishment context than in the Fourth Amendment context. For the purposes of the Fourth Amendment, government conduct in effecting a seizure, such as conducting the transportation of a suspect in custody, must be related to the purpose of the seizure to be legitimate. As discussed above, choreographed and staged perp walks as well as other law enforcement actions involving collusion and cooperation with the media or other actions taken to facilitate the obtaining of images of the perp walk by the press are not re-

⁴⁶⁹ *Bell v. Wolfish*, 441 U.S. 520, 539 (1979) (internal quotation marks omitted).

⁴⁷⁰ See, e.g., *id.* ("[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not be inflicted on detainees *qua* detainees.").

⁴⁷¹ See *supra* Part III. Note that the mere making of a videotape of a perp walk by law enforcement can be connected with legitimate non-punitive law enforcement purposes of "quality control" by law enforcement officers as well as the protection of the officers and the accused, as discussed above. This does not, however, excise the making of a videotape for the express purpose of punishment from the realm of pretrial punishment.

lated to legitimate reasons for transporting a suspect or the objectives of the underlying seizure, and thus do not serve a legitimate purpose. However, a government purpose may indeed be legitimate but also be an illegitimate reason to contravene the privacy and liberty rights of the suspect protected by the Fourth Amendment. The Fourth Amendment balances legitimate government interests with the rights of the suspect and in many cases strikes the balance on the side of the suspect's rights. In contrast, pretrial punishment analysis simply looks to the legitimacy of the governmental purpose involved, whether it is punitive, and whether it appears excessive in relation to any non-punitive purpose. While law enforcement officers employ perp walks to impose punishment before conviction by humiliating the suspect in public in many cases,⁴⁷² the Second Circuit has recognized that the legitimate and seemingly non-punitive law enforcement purpose of informing the public about law enforcement efforts which may convince witnesses and additional victims to come forward may be advanced to justify the exhibition and dissemination of a videotape of a perp walk to the press, a situation bearing significant similarities to a choreographed perp walk, and even a staged perp walk.⁴⁷³

While such an argument may have some appeal, it will likely fail. In *Demery*, the Ninth Circuit rejected the government's argument that the public interest in "having [] pretrial detention centers open to public scrutiny," was a sufficient legitimate governmental purpose to support a finding that the transmission of images of pretrial detainees via a webcam did not constitute pretrial punishment.⁴⁷⁴ The Ninth Circuit noted that the webcam did not serve the legitimate goals of administering pretrial detention facilities, guaranteeing detainees' presence at trial and in promoting prison safety.⁴⁷⁵ Furthermore, and more importantly for this discussion, the Ninth Circuit relied in part on the Supreme Court's rejection of a similar justification for a media ride-along in *Wilson* (which is the same justification for a perp walk raised in the argument above):

⁴⁷² See, e.g., *Kaiser*, *supra* note 3, at 1229.

⁴⁷³ See *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 576 (2d Cir. 2003).

⁴⁷⁴ *Demery v. Arpsio*, 378 F.3d 1020, 1031-32 (9th Cir. 2004).

⁴⁷⁵ See *id.* at 1031.

[T]he Supreme Court has held that the government's otherwise legitimate interest in "informing the general public about the administration of criminal justice" does not justify the presence of reporters during the execution of search warrants in a suspect's home Such press exposure impairs citizens' Fourth Amendment right to be free of unreasonable intrusions into their homes Here, similarly, the otherwise valid governmental interest in assuring accountability and public scrutiny cannot justify broad public exposure of pretrial detainees' intimate circumstances, as none of the purposes justifying pretrial detention are served thereby.⁴⁷⁶

Thus, *Demery* stands for the proposition that a governmental purpose, even if legitimate, does not excise governmental conduct from the realm of pretrial punishment if it does not serve any of the purposes justifying pretrial detention. In the perp walk context, this standard is highly similar to that under the Fourth Amendment, as discussed above. Likewise, and particularly relevant to the perp walk analysis, the *Demery* court's reliance on *Wilson* suggests that if law enforcement conduct related to pretrial detention is unrelated to the purpose of the seizure such that it runs afoul of the Fourth Amendment, the purpose will not constitute a legitimate purpose other than punishment for the purposes of pretrial punishment analysis. Justifications such as informing the public about law enforcement efforts, as discussed in Part III, are insufficient to support law enforcement conduct in connection with a perp walk under the Fourth Amendment, and are wholly unrelated to the purposes of pretrial detention—such as guaranteeing the detainee's presence at trial or other justifications related to pretrial detention sufficient to justify impositions on detainees (i.e., management of the facility in which a detainee is detained—including the maintenance of order and security at the

⁴⁷⁶ *Id.* at 1032 (quoting *Wilson v. Layne*, 526 U.S. 603, 612 (1999) (internal citations omitted)). Just as governmental purposes can be legitimate, yet be insufficiently related to the justifications for the underlying seizure to justify a law enforcement action taken in carrying out a seizure under the Fourth Amendment under *Wilson*, *Demery* indicates that a governmental purpose may be legitimate but may not constitute a legitimate non-punitive governmental purpose sufficient to support an action imposed upon pretrial detainees because it is unrelated to the purposes justifying pretrial detention.

institution and preventing weapons and illegal drugs from reaching pretrial detainees).⁴⁷⁷ Accordingly, staged and choreographed perp walks and other related law enforcement conduct in collusion with the press to facilitate the press's ability to observe and capture images of the transportation of a suspect are unrelated to legitimate non-punitive objectives and thus, under *Bell*, are conducted for the purpose of punishment and constitute improper pretrial punishment.⁴⁷⁸

⁴⁷⁷ Indeed, choreographed perp walks and other government actions entailing collaboration with the media to facilitate the media's observation of a perp walk, such as the exhibition and distribution of the videotape at issue in *Caldarola*, do not serve the purposes justifying pretrial detention. While the *Demery* court did note that it had given prison officials wide latitude in promoting safety in correctional facilities, the Supreme Court in *Wilson* and the Second Circuit in *Lauro* rejected such a justification for media ride-alongs and staged perp walks respectively under the Fourth Amendment, and the analysis in Part III indicates that such a justification is insufficient to support law enforcement conduct involving collaboration with the press to facilitate the press's ability to capture images of a perp walk. See *supra* Parts II & III. As discussed above, the *Demery* court's reliance on *Wilson* suggests that such a purpose would not justify the increased exposure of images of a suspect in custody to the public in the pretrial punishment context. This reasoning is applicable to pretrial punishment analysis pertaining to perp walks. Although one might attempt to argue that *Demery* can be distinguished from the perp walk context as involving a greater affront to detainee privacy, this is not necessarily the case given the greater reach of the media outlets aided in obtaining images of the perp walk by law enforcement collaboration, see *supra* note 458, and at any rate, like the webcam at issue in *Demery*. Choreographed and staged perp walks and other law enforcement collaboration with the media are unrelated to the purposes of pretrial detention (or the more narrow purpose relevant to perp walks of legitimate transportation of a suspect in custody).

⁴⁷⁸ It should be noted that the *Bell* Court expressly found that retribution and deterrence are not legitimate non-punitive governmental objectives and cannot justify impositions on pretrial detainees. 441 U.S. at 539 n.20. Relying on *Bell*, the *Demery* court found that neither specific nor general deterrence could justify an imposition on pretrial detainees. 378 F.3d at 1031 ("[A]s a general matter, deterrence of crime through a variety of means is a legitimate governmental objective[, b]ut . . . where an individual is incarcerated before trial but has not been convicted of any crime, imposing adverse conditions during his detention as a means of deterring crimes is not permissible."). Thus, deterrence of members of the public who view a perp walk is an insufficient justification. In a footnote, the *Demery* court responds to the assertion by the dissenting judge in that case that the jail webcam at issue served the same governmental interest as a perp walk, deterring members of the public from committing similar offenses, by noting that the jail webcam at issue, unlike a perp walk, did not provide the crime for which an inmate viewed on the webcam was arrested for. 378 F.3d at 1031 n.4. While noting that unstaged perp walks were found to comport with the Fourth Amendment in *Caldarola*, the court did not reach the issue of whether perp walks constituted pretrial punishment. As discussed above, the deterrence rationale for

Moreover, even if a court were to conclude that choreographed and staged perp walks and related law enforcement conduct in collaborating with the press to facilitate the press's observation of perp walks are not wholly unrelated to legitimate nonpunitive governmental purposes, a court would likely conclude that the enhanced exposure to the press and public humiliation engendered by choreographed and staged perp walks and other collusive conduct by law enforcement with the media above that involved in ordinary legitimate perp walks is excessive as compared to these purposes. This is especially likely given that these governmental interests may be served by police distribution of mug shots to the press or viewing of perp walks by the press in the absence of collusive opportunities for the press to capture images of a suspect "walking guilty."⁴⁷⁹

an action directed toward pretrial detainees referenced in the footnote in *Demery* and any interpretation of the footnote in *Demery* suggesting that perp walks do not constitute pretrial punishment because they have a deterrent effect are inconsistent with *Bell*. Also, the *Demery* court suggested that shaming is not a legitimate governmental objective. *Id.* at 1032 n.5.

⁴⁷⁹ The publication of a mug shot by the press is less humiliating for the suspect than dissemination of depictions of a perp walk. A mug shot only shows a suspect's face, and no restraints are visible. Furthermore, publication of a mug shot avoids the humiliation caused by the spectacle of a perp walk where the suspect is gawked at and photographed by the press. Publication of a mug shot will fully serve the law enforcement purpose of informing the public of the suspect's arrest and the investigative purpose of inducing additional victims or witnesses to contact the police.

The reasoning here is consistent with the Supreme Court's analysis in *Bell*. While the Court stated that "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment,'" it explained this statement as "say[ing] that in the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive government objective." *Bell v. Wolfish*, 441 U.S. 520, 539 & n.20. (1979) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)). As noted above, the *Bell* court indicated that under this analysis, a restriction related to a legitimate purpose could amount to punishment if excessive. *Id.* The Court noted that:

[L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve security at the institution, [b]ut it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish. *Id.* at 539 n.20. While the example given by the *Bell* Court is more extreme than the context of choreographed and even staged perp walks and related law enforcement

As discussed above, additional factors are relevant to the determination of whether a governmental practice constitutes punishment under the *Bell* Court's framework.⁴⁸⁰

Analysis of these factors further supports the conclusion that choreographed and staged perp walks as well as related law enforcement actions in collaboration with the press are performed for a punitive purpose and constitute punishment.

All perp walks necessarily involve an affirmative restraint as law enforcement officers compel the suspect's movement when he is transported. A suspect is forced to walk in front of the public and the press in a manner that conveys the fact that he is in custody.

Furthermore, public humiliation, such as a perp walk, has been historically viewed as punishment. Subjecting a prisoner to public humiliation by presenting him as guilty to the public has been employed as a means of punishing convicted criminals from colonial times to today.⁴⁸¹ In colonial times, guilty criminals were held up to ridicule by being placed in the stocks or the pillory or being forced to wear a scarlet letter, while today "experimental" judges' fashion shaming punishments to humiliate certain types of offenders in lieu of incarceration.⁴⁸² Although there is scant, if

conduct, as discussed above, there are methods short of a perp walk permeated by collusion with the press to publicize an arrest.

It should be noted that whether and under what circumstances, if any, publicization of a mug shot might constitute improper pretrial punishment is beyond the scope of this Article. There are significant differences between the contexts of perp walks and mug shots. Also, while not addressing the issue, the *Demery* court hinted that publicizing a mug shot would not constitute impermissible pretrial punishment inasmuch as it distinguished *Paul*, which involved the disclosure of an arrest record involving a photograph. *Demery*, 378 F.3d at 1032 n.6.

⁴⁸⁰ *Supra* note 435-36 and accompanying text.

⁴⁸¹ *A Public Shaming*, *supra* note 36; *see also supra* note 124 and accompanying text.

⁴⁸² *See Kaiser*, *supra* note 3, at 1209-10. Perp walks, like colonial punishments entailing public shaming and humiliation, involve more than the dissemination of information. *Cf. Smith v. Doe*, 538 U.S. 84, 98-99 (2002) (distinguishing colonial punishment while articulating that dissemination of truthful information in furtherance of a legitimate governmental objective is not treated as punishment in analyzing historical treatment as punishment in the context of determining whether a sex offender registration and publicization scheme did not violate the proscription of *ex post fact* laws). Indeed, in a perp walk, the suspect is physically handled and often in visible restraints, as he is displayed to the public in a manner imputing guilt, inevitably lead-

any, evidence that perp walks themselves were employed as actual punishments, they subject a suspect to public humiliation like these historical modes of punishment. Thus, a court could very well conclude that a law enforcement practice that publicly humiliates a prisoner, such as a perp walk and law enforcement actions that exacerbate the humiliation, like staging or choreography of perp walks or other collaboration with the media to facilitate dissemination of images of it (as discussed in further detail below), to historically be viewed as punishment.

Choreographed and staged perp walks and related law enforcement conduct in collaboration with the media to facilitate the obtaining of images of a perp walk by the media, such as the exhibition and distribution of the videotaped of a perp walk in *Caldarola*, serve the traditional aims of punishment, retribution, and deterrence. Perp walks are considered to promote retribution. Law enforcement authorities conduct perp walks in part to serve "a public desire for titillation" and to see an accused criminal get his just desserts through humiliation.⁴⁸³ Indeed, perp walks for white collar criminals are perceived as punishment for a class of criminals whom the public believes tend to be inadequately punished by the criminal justice system.⁴⁸⁴ Thus, choreographed and staged perp walks and related law enforcement conduct promote retribution by enhancing the humiliation of a suspect (through increasing exposure to the press and thus dissemination of images of the perp walk), as discussed above and below. A suspect suffers this form of retribution prior to conviction. Furthermore, both courts and commentators alike consider perp walks to promote deterrence.⁴⁸⁵ The spectacle of a perp walk powerfully communicates law enforcement efforts to combat criminal elements and thus may deter those contemplating criminal activity from actual-

ing to public shaming and humiliation. A counterargument is that unlike colonial shaming punishments, there is a good case that the government does not make the publicity and resulting stigma stemming from a perp walk an integral part of the objective of the regulatory scheme, *see id.*, notwithstanding the motivations of law enforcement officers discussed below.

⁴⁸³ *See, e.g.*, Martin, *supra* note 41.

⁴⁸⁴ *See supra* note 109.

⁴⁸⁵ *See, e.g.*, *Caldarola v. Cnty. of Westchester*, 343 F.3d 570, 572-73 (2d Cir. 2003); Kaiser, *supra* note 3, at 1229; Malave, *supra* note 465.

ly engaging in it.⁴⁸⁶ Furthermore, the widespread humiliation of suspects via perp walks serves to deter others from committing crimes as they would like to avoid the humiliation of a perp walk.⁴⁸⁷ As is the case in the retribution context, choreographed and staged perp walks and related law enforcement conduct promote deterrence by enhancing public exposure and humiliation of the suspect.

Finally, courts might also consider choreographed and staged perp walks and related law enforcement conduct related to collaboration with the media in the perp walk context to come into play only upon a finding of *scienter* because citizens may only be arrested and detained upon a finding of probable cause. However, there is a valid counterargument that *Bell* proscribes punishment of pretrial detainees and such a view would indicate that any condition or restriction of pretrial detention is punitive (rendering this factor nugatory in an analysis relating to pretrial detention)—a perp walk is not imposed on the basis of an additional finding of *scienter* based on additional conduct by a pretrial detainee. Perp walks do not implicate the factor of applicability to conduct that is a crime because a perp walk does nothing to prevent and is not otherwise related to illegal conduct by detainees (although one might argue that they only occur when a person is arrested for a crime, subject to the counterargument discussed above). Nonetheless, as a whole, the additional factors articulated in *Bell* support a finding that perp walks, and in particular choreographed and staged perp walks and related law enforcement conduct, constitute punishment.⁴⁸⁸ Therefore, choreographed and staged perp walks and related law enforcement conduct satisfy the standard articulated in *Bell* for a government practice to constitute unconstitutional preconviction punishment.

⁴⁸⁶ See *Caldarola*, 343 F.3d at 572-73.

⁴⁸⁷ See *Kaiser*, *supra* note 3, at 1229; *Malave*, *supra* note 465.

⁴⁸⁸ Although the additional factors in *Bell* indicate that aspects of all perp walks, including legitimate ones, are punitive, such perp walks are incident of a legitimate non-punitive governmental objective—the legitimate transportation of a suspect in custody—and are not excessive with respect to it, as discussed above. Accordingly, given the primacy of these issues in the *Bell* analysis, such perp walks do not constitute pretrial punishment, as discussed above.

Even under a rule such as that articulated by the Ninth Circuit in *Demery* where there is a distinct and express requirement of a harm or disability such that the harm or disability caused by the government conduct is significantly greater than or independent of that caused by the intrusion inherent in incarceration for pretrial punishment to occur,⁴⁸⁹ staged and choreographed perp walks and related law enforcement conduct would meet this standard and constitute impermissible pretrial punishment. For instance, in *Demery*,⁴⁹⁰ the Ninth Circuit held that the discomfort to a pretrial detainee of having images of his incarceration broadcast to the public via a webcam is incalculably greater than having jail guards and fellow inmates view him while incarcerated and thus held that such a webcam constituted unconstitutional pretrial punishment.⁴⁹¹ Indeed, while “[b]eing detained . . . necessarily involves being observed by [] staff . . . and the other detainees,” the Ninth Circuit found that “[t]he webcams increase exponentially the number of people observing detainees, and also alter drastically the classes of people who can watch the detainees,” in finding that the discomfort caused was greater than that inherent in in-

⁴⁸⁹ See *Demery v. Arpaio*, 378 F.3d 1020, 1030 (9th Cir. 2004).

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.* at 1030, 1033. According to the *Demery* court, an example of a government practice that does not impose a hardship great enough to rise to the level of unconstitutional pretrial punishment is double-bunking of pretrial detainees even though it results in additional discomfort for the detainee arising from sharing already close quarters with another inmate. *Id.* at 1030 (citing *Bell v. Wolfish*, 441 U.S. 520, 543 (1979)). The *Bell* Court was not very clear in applying the analysis it set forth to the double-bunking conditions at issue and indicated that such conditions did not approach such hardship that would raise serious questions as to whether confining a given number of people in a given amount of space would amount to punishment. 441 U.S. at 542-43. While this might be taken to support an independent quantitative requirement for pretrial punishment above the *Bell* Court's requirement that the imposition not be *de minimis*, the *Bell* court did not expressly impose such a requirement and indicated that the issue was judged under the analysis it set forth. *Id.* at 541. However, the *Bell* Court noted that effective management of a detention facility was a valid objective that could justify imposition of conditions and restrictions of pretrial detention, *id.* at 540, so its specific analysis going to degree or magnitude could be interpreted as supporting the conclusion that double-bunking was not excessive with respect to such an objective or as possibly indicating that the double-bunking was a *de minimis* imposition.

carceration and that there was harm for the purposes of pretrial punishment analysis.⁴⁹²

Likewise, while an unchoreographed perp walk resulting from a legitimate transportation of a suspect in custody and the attendant exposure of the event to the press and public is a discomfort inherent in pretrial incarceration, the increased exposure effected by law enforcement collusion with the press or other conduct to facilitate the press's ability to capture images of a perp walk, such as that which occurs in choreographed and staged perp walks, is not inherent in pretrial detention. Indeed, a choreographed or staged perp walk greatly increases the exposure of images of the suspect in custody to the public. In an unchoreographed perp walk, the suspect in custody is viewed only by those members of the public and the press who happen to be present in the area where he is being moved. In contrast, when a perp walk is choreographed and law enforcement officers collude with the press to facilitate the press's ability to capture images of the suspect in custody, the press is virtually certain to be present and likely to be present in greater numbers than in the unchoreographed perp walk situation. In a staged perp walk, the suspect is taken from the jail and displayed publicly for the press unnecessarily. Thus, a staged perp walk creates an opportunity for the public and press to observe a defendant in custody in addition to such opportunities incidental to pretrial detention. Furthermore, law enforcement's exhibition and distribution of a videotape of a perp walk to the media, as occurred in *Caldarola*, is not a discomfort inherent in pretrial detention and significantly increases the exposure of images of the perp walk to the press, likely to a greater extent than a choreographed or even a staged perp walk because members of the press who were not present for the perp walk are able to view, obtain, and further disseminate images of the perp walk.

The increased exposure to the press in these situations exacerbates the humiliation and embarrassment felt by the suspect as well as any pollution of the jury pool beyond that inherent in pre-

⁴⁹² *Demery*, 378 F.3d at 1030 ("[T]he additional impact on pretrial detainees of webcam transmission is greater by several orders of magnitude than the intrusion inherent in incarceration.").

trial detention because it increases the dissemination of images of the perp walk by additional press organizations, which potentially reach millions of people. Accordingly, choreographed and staged perp walks, as well as the exhibition and distribution of the perp walk videotape at issue in *Caldarola*, cause significantly more discomfort to a suspect than mere legitimate transportation in public places while in custody. This conclusion is consistent with the Ninth Circuit's reasoning in *Demery* that additional embarrassment is caused by law enforcement conduct that increases the exposure of images of the suspect in custody to the public beyond that which is caused by the intrusion inherent in pretrial incarceration.⁴⁹³ Furthermore, as discussed above, the harm or disability engendered by staged and choreographed perp walks and related law enforcement conduct in collusion with the press may be considered independent of the inherent discomforts of confinement, given that, as discussed above, such law enforcement conduct is neither inherent in pretrial detention nor serves the pur-

⁴⁹³ A counterargument in the choreographed perp walk context (and related contexts) is that unchoreographed legitimate perp walks occur in public places and choreographing the perp walk merely increases the number of press representatives present at a perp walk incidental to pretrial detention. Likewise, other law enforcement activities in collaboration with the press to facilitate observation of a perp walk, such as the exhibition and distribution of the videotape at issue in *Caldarola* merely increase the public exposure of such a perp walk (as the videotaped perp walk could have been viewed only by individuals present in the parking lot in *Caldarola*), while the webcam in *Demery* and staged perp walks create opportunities for observation of the suspect in custody by the public and/or press that are wholly in addition to the burdens of pretrial detention. Thus, the discomfort caused by choreographed perp walks and related law enforcement conduct might not be considered to cause significantly greater harm or disability than that inherent in pretrial confinement. While this argument has some merit, it fails. First, while the actual transportation of a suspect is a part of legitimate pretrial confinement, law enforcement actions to promote the publicizing of the suspect's custody by the press are beyond the scope of the discomfort and disability inherent in legitimate pretrial detention. Second, choreographed perp walks and related law enforcement conduct, such as the exhibition and distribution of the videotape of a perp walk at issue in *Caldarola*, promote the observation of the suspect in custody by press organizations that can disseminate images of suspects to millions of people while the webcam in *Demery*, although popular, did not reach as large of an audience as many conventional media outlets. Thus, an incremental increase in harm in the press context may constitute significant harm. Moreover, as discussed below, one might say that choreographed and staged perp walks and related law enforcement conduct lead to harms independent of those inherent in pretrial confinement.

poses justifying pretrial detention.⁴⁹⁴ Indeed, one might say that any law enforcement collusion with the press to facilitate the

⁴⁹⁴ Alternatively, one might say that the harms engendered by a legitimate perp walk discussed above are inherent in pretrial detention so that the enhanced harms caused by law enforcement actions such as staged and choreographed perp walks and related collusive conduct with the press are better analyzed as possibly exceeding the discomforts inherent in pretrial detention rather than as possibly being independent of such discomforts. This turns in large part on the scope of the cause of the harm considered in the analysis. The harm caused by the specific act of staging or choreographing a perp walk or a related act of collusion with the press is independent of the inherent discomforts of pretrial detention. However, as discussed above, the harm caused by a perp walk and the transportation of a suspect in custody for legitimate purposes in public, such as to and from court appearances and from the place of arrest to a police vehicle, is inherent in the discomforts of pretrial detention and thus are not independent of such discomforts. Indeed, as indicated above, choreographed and staged perp walks and related law enforcement actions cause similar types of harm but to a greater extent. Rather, the additional harm caused by law enforcement conduct, such as choreography and staging of a perp walk and related conduct, can be viewed as an exacerbation of such harms and analyzed for whether it significantly exceeded the inherent discomforts of confinement.

Given that choreography of a perp walk and related law enforcement conduct occur in conjunction with the legitimate transportation of a suspect in custody, the argument that such conduct is more appropriately analyzed for exceeding rather than being independent of the inherent discomforts of pretrial confinement is strongest. Indeed, given the relationship to a legitimate transportation of a suspect in custody causing harm inherent in pretrial detention, there is a meritorious argument that choreographed perp walks and related conduct are not independent of the harms inherent in pretrial detention. The same argument can be advanced in the staged perp walk context because a staged perp walk can be said to recreate, albeit fictitiously, a legitimate arrest, perp walk, and transportation of a suspect in custody for the benefit of the media and permit media entities that were not present for a legitimate movement of a suspect to view the event. However, the argument is less persuasive in the staged perp walk context because a staged perp walk involves a movement of a suspect in addition to the movement inherent in pretrial detention and thus can be considered to cause harm independent of the discomforts inherent in pretrial confinement. It should be noted that given the above analysis indicating that staged and choreographed perp walks and related law enforcement conduct cause harm or disability that significantly exceeds the inherent discomforts of confinement, the first requirement set forth in *Demery* is met and this issue has little actual impact on the result of the *Demery* analysis in such contexts.

The Ninth Circuit in *Demery* did not delineate the differences between a harm or disability that significantly exceeds versus one that is independent of the inherent discomforts of confinement. Rather, the Ninth Circuit in *Demery* merely determined that the intrusion associated with the jail webcams at issue was greater by several orders of magnitude than that inherent in incarceration, which goes to a harm or disability significantly greater than one inherent in pretrial confinement. 378 F.3d at 1030. The court did not explore the contours of independence of the inherent discomforts of confinement. It should be noted that if the possible view discussed in the preceding

press's ability to obtain images of a perp walk that increases exposure of a perp walk to the press and public goes beyond and/or is independent of the discomforts inherent in pretrial detention and thus constitutes harm or disability sufficient to constitute punishment.⁴⁹⁵ Moreover, even putting aside the *Demery* court's en-

paragraph that harms similar in type (but greater in magnitude) are not independent of the harms inherent in pretrial confinement (as opposed to the view that such specific harms caused by government acts that are not inherent in pretrial detention are not inherent in pretrial detention), the argument discussed above, *see supra* note 458, that the analysis of whether a harm or disability caused by the government's action significantly exceeds or is independent of the harms inherent in pretrial detention (the first requirement for pretrial punishment in the approach set forth in *Demery*) collapses into the punitive purpose analysis (the second requirement for pretrial punishment in the approach set forth in *Demery*) is significantly less powerful. This is because under such an interpretation, in cases where the enhanced harm caused by a government action that meets the criteria set forth in *Bell* for being taken for the purpose of punishment (i.e., is unrelated to or excessive with a legitimate nonpunitive governmental purpose or is taken with an express intent to punish) is greater than that inherent in pretrial confinement by only a small degree (but not so small as to be *de minimis*, which would exclude it from the purview of unconstitutional pretrial punishment under *Bell*) and thus is not viewed as significantly exceeding the inherent discomforts of confinement but is of a similar enough character to the inherent discomforts of pretrial confinement that it would not be considered independent of such discomforts the first requirement of the *Demery* approach would not be satisfied despite the satisfaction of the second requirement.

However, given the Supreme Court's focus in *Bell* on determining whether an action is taken for the purpose of punishment in analyzing whether the action constitutes pretrial punishment and the Court's prescription that conditions of pretrial detention cannot amount to punishment discussed above, the argument that any harm stemming from government conduct that is taken for the purpose of punishment pursuant to *Bell* (i.e., conduct that is unrelated to or excessive with a legitimate nonpunitive governmental purpose or is taken with an expressed intent to punish) is independent of the inherent discomforts of confinement is strong, since *Bell* indicates that pretrial detention and the inherent incidents of such confinement are permissible and do not constitute pretrial punishment. *See supra* notes 425-448 and accompanying text. Given that such a position is supported by *Bell*, this reasoning would appear to overcome the counterargument that such a view might largely render the first requirement in the *Demery* analysis, and in particular, any analysis of whether imposition significantly exceeded that inherent in pretrial detention, nugatory where the second requirement in the analysis was met.

⁴⁹⁵ The mere making of a videotape of a perp walk by law enforcement likely does not impose enough of a hardship on a suspect to significantly exceed the inherent discomforts of pretrial confinement under *Demery*. Unlike the exhibition and distribution of such a videotape to the media, the making of the tape by law enforcement in itself does not lead to widespread publicization of the images of a perp walk. Indeed, law enforcement officers necessarily are present for and observe a perp walk and likewise observe the transportation of a suspect in custody in restraints in the detention facility

hanced requirement of a harm or disability, the above analysis indicates that the imposition on a pretrial detainee effected by a staged or choreographed perp walk or related law enforcement conduct, such as the exhibition and dissemination of the videotape of the perp walk at issue in *Caldarola*, and the increased imposition on the suspect of such perp walks over legitimate perp walks are not *de minimis*, as is expressly required for pretrial punishment to be unconstitutional under *Bell*.⁴⁹⁶

However, a possible criticism of applying pretrial punishment analysis in the perp walk context is that it violates the Supreme Court's prescription that a claim which can be characterized as a violation of the Fourth Amendment should be analyzed as such and not as a substantive due process claim, such as a claim for unconstitutional preconviction punishment.⁴⁹⁷ This criticism was

where he was held. Thus, any additional viewing of such a tape by law enforcement officers does not significantly exacerbate the intrusion inherent in incarceration. Likewise, in detention facilities, suspects in custody are often recorded and observed by law enforcement officers. Moreover, the making and viewing of such a tape by law enforcement officers does not engender the humiliation and erosion of the presumption of innocence that actions facilitating the public dissemination of the tape do. As discussed above, the making of a videotape of a perp walk might be said to be independent of the inherent discomforts of pretrial confinement (especially when done for the purpose of punishment) although, as discussed above, the making of a videotape of a perp walk can often be non-punitive and performed for legitimate non-punitive purposes.

⁴⁹⁶ Given the minimal effects on the privacy interests of a suspect implicated by perp walks of the making of a videotape of a perp walk and the fact that the making of a videotape of a perp walk by law enforcement itself does not necessarily result in the viewing of the tape by persons other than law enforcement officers, a court might also consider the making of a videotape of a perp walk to constitute a *de minimis* imposition on a suspect in custody.

⁴⁹⁷ See, e.g., *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998); *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) ("[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."); *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)) (internal quotation marks omitted)); see also *Graham v. Connor*, 490 U.S. 386, 395 (1989) (holding that when a particular amendment provides an explicit source of constitutional protection against a particular sort of government behavior, that amendment should govern claims regarding this behavior rather than the more generalized notion of substantive due process).

raised by the only commentator to hitherto consider the application of preconviction punishment analysis to perp walks.⁴⁹⁸ In addition, the Second Circuit relied in part on this notion to reject the argument that the penumbral right of privacy grounded in Supreme Court cases dealing with reproductive rights covered perp walks, reasoning that a “perp walk . . . is best viewed as an exacerbation of the seizure that occur[s] when [a suspect is] arrested” and thus should be analyzed under the Fourth Amendment.⁴⁹⁹ Consequently, this argument might be extended to foreclose a preconviction punishment challenge to perp walks as the right to avoid preconviction punishment is a due process right.

The effect of this argument in the context of applying pretrial punishment standards to perp walk context is far from clear. In-

Courts generally consider the right to be free of pretrial punishment articulated in *Bell* a substantive due process right. *See, e.g.*, *Jones v. Horne*, 634 F.3d 588, 598 (D.C. Cir. 2011) (“The substantive due process protections afforded by *Bell v. Wolfish* and its progeny against punishment contemplate that a legitimate government interest may require additional restrictions on pretrial detainees.”); *Valdez v. Rosenbaum*, 302 F.3d 1039, 1045 (9th Cir. 2002) (“Pretrial detainees have a substantive due process right against restrictions that amount to punishment.”); *Ayers v. Richards*, No. C08-5541, 2010 U.S. Dist. LEXIS 126455, at *54 (W.D. Wash. Nov. 4, 2010) (“Pretrial detainees have a substantive due process right against restrictions that amount to punishment because the State may not impose punishment before an adjudication of guilt.”); *see also Block v. Rutherford*, 468 U.S. 576, 593 (Blackmun, J., concurring in judgment) (indicating that the standard announced in *Bell* was a “substantive due process standard”); *Stevenson v. Carroll*, 495 F.3d 62, 69 (3d Cir. 2007) (indicating that a pretrial punishment claim is a substantive due process claim); *Hart v. Sheahan*, 396 F.3d 887, 892 (7th Cir. 2005) (“[W]hatever the motive is, if the brutal treatment is gratuitous, due process in its substantive sense has been violated.”); *Demery*, 378 F.3d at 1032 n.6 (referring to “a pretrial detainee’s Fourteenth Amendment Substantive Due Process right to be free from punishment”). Indeed, the Supreme Court has recognized that *Bell* did not involve a procedural due process claim. *See Block*, 468 U.S. at 591 n.12; *see also Muhmmaud v. Murphy*, 632 F. Supp. 2d 171, 177 (D. Conn. 2009). However, some courts have applied the *Bell* punishment analysis in evaluating procedural due process claims. *See, e.g.*, *Fuentes v. Wagner*, 206 F.3d 335, 341-43 (3d Cir. 2000); *Bagent v. Mims*, No. 1:06-cv-01842, 2010 U.S. Dist. LEXIS 84537, at *23-25 (E.D. Cal. Aug. 17, 2010); *see also Baribeau v. City of Minneapolis*, 596 F.3d 465, 483 (8th Cir. 2010). If a claim pertaining to pretrial punishment could properly be interpreted as a procedural due process claim, it might escape the Supreme Court’s foreclosure of substantive due process analysis where another more specific constitutional provision might apply. Further examination of this issue is beyond the scope of this Article.

⁴⁹⁸ *See Kaiser, supra* note 3, at 1234-36.

⁴⁹⁹ *Lauro v. Charles*, 219 F.3d 202, 208 (2d Cir. 2000).

deed, in *Graham v. Connor*,⁵⁰⁰ the case first explicitly articulating this rule in the excessive force context, the Supreme Court noted that it had not “resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins,” but stated that it was clear that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment, citing *Bell*.⁵⁰¹ The Sixth Circuit has noted that “the Supreme Court has not yet pinpointed the exact point along the pretrial continuum where the Fourth Amendment’s protection gives way to the protection of another Amendment.”⁵⁰² The situation has been described as a “legal ‘twilight zone.’”⁵⁰³ In the excessive force context, there is a complicated split of authority among the lower courts as to the point at which arrest, governed by the Fourth Amendment and excluded from the purview of substantive due process under *Graham*, ends and pretrial detention, to which substantive due process analysis is applicable, begins.⁵⁰⁴ Standards applied by courts include application of the Fourth Amendment until the suspect is securely in custody, after the act of arrest, while the suspect is still in the joint or sole custody of the arresting officers, until the suspect is charged, or until the suspect appears before a neutral magistrate for arraignment.⁵⁰⁵ Some

⁵⁰⁰ *Graham v. Connor*, 490 U.S. 386 (1989).

⁵⁰¹ *Id.* at 395 n.10 (citing *Bell*, 441 U.S. at 535-39).

⁵⁰² *Johnson v. City of Cincinnati*, 310 F.3d 484, 491 (6th Cir. 2002) (citing *Graham*, 490 U.S. at 395 n.10).

⁵⁰³ *Aldini v. Bodine*, 609 F.3d 858, 864 (6th Cir. 2010) (quoting *Wilson v. Spain*, 209 F.3d 713, 715 (8th Cir. 2000)).

⁵⁰⁴ See, e.g., *Aldini*, 609 F.3d at 864-65 & n.6 (collecting cases); Jill I. Brown, Comment, *Defining “Reasonable” Police Conduct: Graham v. Connor and Excessive Force During Arrest*, 38 UCLA L. Rev. 1257, 1270 & n.86 (1991) (same); Eamonn O’Hagan, Note, *Judicial Illumination of the Constitutional “Twilight Zone”: Protecting Post-Arrest, Pretrial Suspects from Excessive Force at the Hands of Law Enforcement*, 44 B.C. L. Rev. 1357, 1373-84 (2003) (same).

⁵⁰⁵ See *supra* note 504. Resolution of this split of authority is beyond the scope of this Article. For further discussion, see example, O’Hagan, *supra* note 504. Some cases suggest that the dividing line between the applicability of Fourth Amendment and substantive due process standards differs for arrests with and without a warrant. For instance, some authority indicates that it is error to apply the Fourteenth Amendment where a suspect was arrested without a warrant prior to a probable cause hearing or

courts do not use the standard they employ in excessive force cases and apply a different standard depending on the facts of the case (i.e., the particular government conduct alleged to violate the Constitution or type of alleged constitutional violation at issue)⁵⁰⁶ and others have indicated that the relevant constitutional provisions may "overlap and blur in certain factual contexts."⁵⁰⁷

Perp walks can occur at many places in the continuum of dividing lines between arrest and pretrial detention articulated by courts in the excessive force context, such as immediately after an arrest to a police car (as occurred in *Caldarola*), from the police car to the stationhouse, from the stationhouse and/or jail to and from his initial court appearance (also as in *Caldarola*), and to and from subsequent court appearances prior to conviction (including those for trial). Likewise, a videotape of a perp walk can be exhibited and distributed to the press at various times. The applicability of pretrial punishment analysis to a given perp walk may very well turn on when the perp walk took place and the rules applied in the particular jurisdiction.

Perhaps because of the Second Circuit's rejection of the applicability of the penumbral right to privacy tied to substantive due process in the perp walk context, and its finding that perp walks are best analyzed under the Fourth Amendment, no case law explores the putative boundary between the Fourth Amendment and substantive due process in the perp walk context. In support of its conclusion that the Fourth Amendment covered perp

arraignment but that this is not the case where a suspect is arrested pursuant to a warrant, as probable cause has already been found. See *Aldini*, 609 F.3d at 864-67 & nn.6 & 8. Other courts appear to suggest that such a standard may apply regardless of whether an arrest is pursuant to a warrant or not. See *Barrie v. Grand Cnty.*, 119 F.3d 862, 866 (10th Cir. 1997) (quoting *Austin v. Hamilton*, 945 F.2d 1155, 1160 (10th Cir. 1991)); *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989) ("We think the Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned or formally charged, and remains in the custody (sole or joint) of the arresting officer.").

⁵⁰⁶ See *Barrie*, 119 F.3d at 866-69 (noting that the Fourth Amendment applies in the excessive force context where a person has been arrested without a warrant but has not had a probable cause hearing but applying a standard sounding in substantive due process in a jail suicide case under the same circumstances and distinguishing the excessive force context).

⁵⁰⁷ *Aldini*, 609 F.3d at 864 n.6 (citing *Petta v. Rivera*, 143 F.3d 895, 910-14 (5th Cir. 1998)).

walks, the *Lauro* court noted that Fourth Amendment protections were not inapplicable "to persons lawfully in police custody" and cited authority for the proposition that a seizure continues throughout pretrial detention, suggesting that any perp walk was governed by the Fourth Amendment, regardless of when it took place.⁵⁰⁸ The *Lauro* court did not consider the timing of the perp walk in concluding that the Fourth Amendment applied (although it did occur prior to a court appearance after the suspect had been in the stationhouse for about two hours).⁵⁰⁹ While inconsistent with the line of authority developed in the excessive force context concerning the temporal scope of the Fourth Amendment, this view of the scope of the Fourth Amendment finds support in the language of the Supreme Court's plurality opinion in *Albright v. Oliver*,⁵¹⁰ indicating that the Fourth Amendment addresses "the matter of pretrial deprivations of liberty"⁵¹¹ Under such a

⁵⁰⁸ *Lauro v. Charles*, 219 F.3d 202, 212 (2d Cir. 2000) (Ginsburg, J., concurring) (citing *Albright v. Oliver*, 510 U.S. 266, 277-79 (1994)). The *Lauro* court also stated that "the fact that [the suspect] was lawfully under arrest when [the staged perp walk] occurred does not mean that no Fourth Amendment interest of [the suspect] was implicated." *Id.* The statements and reasoning in *Lauro* appear to be in conflict, at least to some extent, with the Second Circuit's acknowledgement of the boundary between the applicability of the Fourth Amendment and substantive due process analysis in the context of excessive force. See *Powell*, 891 F.2d at 1044 ("We think the Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned or formally charged, and remains in the custody (sole or joint) of the arresting officer."). However, one might note that the Second Circuit's statement in *Powell* that "the Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned or formally charged, and remains in the custody (sole or joint) of the arresting officer," see *id.*, is qualified and the "at least" language in particular might be taken as not formally inconsistent with the position that a seizure continues throughout pretrial detention. However, the language in *Powell* does suggest an acknowledgment that there is a boundary between the applicability of the Fourth Amendment and substantive due process analysis, which is at odds with the proposition that a seizure continues throughout pretrial detention.

⁵⁰⁹ 219 F.3d at 204-05. It is unclear if the suspect was in the custody of the arresting officer in *Lauro* while he was at the precinct, although he was taken on his staged perp walk by the arresting officer. See *id.*

⁵¹⁰ 510 U.S. 266 (1994).

⁵¹¹ *Id.* at 274 (plurality opinion) ("The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it."); see also *Johnson v. City of Cincinnati*, 310 F.3d 484, 491 (6th Cir. 2002) ("Generally, the Fourth Amendment applies to 'pretrial deprivations of liberty.'" (quoting *Albright*, 510 U.S. at 274)). On the contrary, such an interpretation seems inconsistent with the statements

view where the Fourth Amendment applies throughout pretrial detention, perp walks would be analyzed under the Fourth Amendment rather than the substantive due process prohibition of pretrial punishment.⁵¹²

in *Graham* indicating that substantive due process does not apply where another amendment applies and that excessive force claims against pretrial detainees are governed by substantive due process principles, suggesting that they are not covered by the Fourth Amendment and that there is some point during pretrial detention where the Fourth Amendment does not apply. For an alternative interpretation of the language in *Graham* indicating that substantive due process principles applied to excessive force claims during pretrial detention, see *infra* notes 523-24 and accompanying text.

⁵¹² The Second Circuit in *Lauro* cited Justice Ginsburg's conclusion in her concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994), a case involving improper arrest and prosecution and pretrial restrictions other than incarceration that a seizure implicating the Fourth Amendment continues so long as the suspect is bound to appear in court and answer the state's charges, for the proposition that a seizure continues throughout pretrial detention to support its prescription that "the Fourth Amendment shields arrestees from police conduct that unreasonably aggravates the intrusion on privacy properly occasioned by the initial seizure" and that the Fourth Amendment's protections apply to those in police custody. *Lauro*, 219 F.3d at 212 (citing *Albright*, 510 U.S. at 277-79 (Ginsburg, J., concurring)). In malicious prosecution cases, there are cases from Courts of Appeals relying primarily on Justice Ginsburg's *Albright* concurrence that indicate that certain pre-trial detention conditions implicate the Fourth Amendment's prohibition on unreasonable seizures. See, e.g., *Johnson v. City of Cincinnati*, 310 F.3d 484, 492 (6th Cir. 2002) (citing cases outside of the context of pretrial incarceration). For instance, the Second Circuit cited Justice Ginsburg's concurrence in *Albright* with approval in holding that conditions on pretrial release are viewed as a seizure and implicate the Fourth Amendment. See *Murphy v. Lynn*, 118 F.3d 938, 946 (2d Cir. 1997) (citing *Albright*, 510 U.S. at 278-79 (Ginsburg, J., concurring)). Indeed, Justice Ginsburg's conclusion that a seizure for purposes of the Fourth Amendment continues so long as a defendant is bound to appear in court and answer the charges or so long as the prosecution against him remains pending, is equally applicable to cases where the defendant is incarcerated or in custody prior to trial as it is beyond peradventure (and alluded to by Justice Ginsburg) that a defendant incarcerated, in custody, or under arrest is bound to appear for trial, which means that the defendant is seized under Justice Ginsburg's framework. See *Albright*, 510 U.S. at 279-80 (Ginsburg, J., concurring) (stating that a defendant who is "bound to appear" is "seized" for trial). Indeed, Justice Ginsburg further indicated that a person incarcerated until trial "no doubt suffers greater burdens" than the pretrial release conditions at issue in *Albright* that Justice Ginsburg considered a seizure. *Id.* at 279. The Second Circuit's reliance in *Lauro* in the perp walk context involving defendants in custody on Justice Ginsburg's concurrence in *Albright* is consistent with this view. However, as alluded to above, see *supra* note 512, the Second Circuit's application of the principle that a seizure extends through the pretrial process or so long as the defendant is bound to appear to answer the state's charges in the perp walk context in *Lauro*, and with respect to conditions on pretrial release in *Murphy*, appear to be at least somewhat inconsistent with the Se-

Moreover, the *Lauro* court indicated that during the perp walk, the suspect was seized in the sense that he was physically restrained by handcuffs and the grip of police officers, and was forced to walk and be transported.⁵¹³ The court further indicated that a perp walk might be viewed as a seizure separate from the arrest itself.⁵¹⁴ Under this reasoning, indicating that a perp walk itself constitutes a seizure independent of the initial arrest, perp walks might be distinguished from excessive force claims and covered by the Fourth Amendment instead of pretrial punishment analysis under substantive due process rights.⁵¹⁵

cond Circuit's acknowledgement of the boundary between the applicability of the Fourth Amendment and substantive due process analysis in the context of excessive force in *Powell*. Indicative of the legal morass and unpredictability in this area, this appears to be another example of a court approaching the temporal scope of the Fourth Amendment differently in different contexts. Some Courts of Appeals have rejected the proposition that a seizure extends throughout pretrial detention and Justice's Ginsburg's "continuing seizure" theory. See, e.g., *Nieves v. McSweeney*, 241 F.3d 46, 56 (1st Cir. 2001) (collecting cases). Indeed, the cases discussed above where courts have drawn a line between arrest and seizure covered by the Fourth Amendment and pretrial detention in the excessive force context constitute a rejection of the continuing seizure theory, under which the Fourth Amendment would govern the entirety of pretrial detention. Complicating matters is that *Albright* stands for the proposition that a plaintiff alleging that a criminal prosecution was improperly initiated against him has not properly stated a claim for violation of substantive due process rights, but must show a violation of his rights under the Fourth Amendment. See *Albright*, 510 U.S. at 268, 274-75; *Murphy*, 118 F.3d at 944. This might provide some explanation of the analysis of continuing pretrial conditions other than incarceration under the Fourth Amendment in such cases (e.g., *Murphy*, discussed above). However, cases involving malicious prosecution and pretrial restrictions other than incarceration are distinguishable from the perp walk context. Likewise, as discussed below, excessive force cases are also distinguishable from perp walk cases.

⁵¹³ 219 F.3d at 212.

⁵¹⁴ *Id.* The latter of these two arguments is strongest for staged perp walks involving a movement separate from a legitimate one and perp walks other than the initial transportation to a police car, which is more easily seen as part of the initial arrest.

⁵¹⁵ A counterargument might be that if a perp walk is viewed as an independent seizure then at least some instances of excessive force, especially those involving physical grasping or seizing of a suspect in custody, might also be viewed as independent seizures, undercutting an attempt to distinguish between the excessive force and perp walk contexts on this basis.

As discussed above, the *Lauro* court indicated that a perp walk could be viewed as either a seizure separate from the original arrest or a continuation and aggravation of the seizure that occurred when the suspect was arrested, but did not decide this issue as it found that the Fourth Amendment analysis would be the same under either approach. 219 F.3d at 212-13. Later in the opinion, the court described its holding in

However, especially since some courts modulate the line between the Fourth Amendment and substantive due process based on context or facts, some characteristics of many perp walks cut in favor of applying pretrial punishment standards at an earlier point than in the context of excessive force.⁵¹⁶ Many perp walks occur after the suspect has been arrested (indeed there is an argument that all perp walks do as the suspect is under arrest during a perp walk from the place of arrest), the media has been alerted (of a transfer to a courthouse, for instance), and time has passed.⁵¹⁷ Thus, the suspect has likely been in custody for a period of time, for instance, whether a suspect is being taken to an initial appearance, a probable cause hearing, or a later hearing.⁵¹⁸ Furthermore, it is likely (but not certain) that where law enforcement colludes with the press to facilitate the ability of the press to observe and capture images of a perp walk, such as in a choreographed perp walk, law enforcement intends to charge the suspect.⁵¹⁹ For instance, in *Caldarola*, if law enforcement did not intend to charge the suspects, they would not have choreographed the arrival of the suspects to arrest them together, videotaped the initial perp walk, held a press conference where the tape was exhibited and copies distributed, or notified the press of the transportation of the suspect to the courthouse.⁵²⁰ Thus, in the perp walk context, even though suspects may not have been formally charged, or arraigned, it has been argued that they are treated as such and thus would be considered pretrial detainees to which substantive due process applies.⁵²¹ Indeed, the Tenth Circuit applied a standard sounding in substantive due process in a jail suicide case involving an arrest without a warrant prior to a court

terms of exacerbation of the seizure at the time of the arrest. *Id.* at 212-13; see *supra* note 250 and accompanying text. As discussed above, it is difficult to reconcile the latter approach with authorities defining the temporal scope of the Fourth Amendment in the excessive force context as, for instance, one might view a beating during pretrial detention (like a perp walk) as an aggravation of the initial seizure and anything occurring during pretrial detention as a continuation of it.

⁵¹⁶ See Kaiser, *supra* note 3, at 1236.

⁵¹⁷ See *id.*

⁵¹⁸ See *id.*

⁵¹⁹ See *id.*

⁵²⁰ See *id.*

⁵²¹ See *id.*

appearance, circumstances under which it would apply the Fourth Amendment in the excessive force context.⁵²² As discussed above, the perp walk context is similar to the jail suicide context inasmuch as a suspect is in a similar position and treated like a pretrial detainee, regardless of whether an arraignment or probable cause hearing has occurred.

In sum, the likelihood that a court faced with a pretrial punishment claim regarding a perp walk would consider applying the Supreme Court's pretrial punishment framework is a complex issue that is highly dependent on the facts and jurisdiction. The rule that a constitutional claim covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process, leads to a great deal of uncertainty regarding when courts might apply the substantive due process pretrial punishment analysis to perp walks. In theory, the Fourth Amendment might be said not to apply to perp walks that are found to occur during pretrial detention after the arrest is over and to be subject to substantive due process analysis as the "seizure" is completed, although, as discussed above, some authority indicates that the Fourth Amendment applies throughout pretrial detention.

However, there is authority indicating a possible role for the Fourth Amendment even in cases where substantive due process analysis appears to apply. The Supreme Court seems to acknowledge a gray area here as it has expressly stated that it has not decided "whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins" and noted that substantive due process analysis applies to pretrial detainees.⁵²³ This language leaves open the possibility that, despite the Court's statements that cases covered by other amendments should be analyzed under the applicable amendment instead of with substantive due process principles, the Fourth Amendment may also provide protection to pretrial

⁵²² See *Barrie v. Grand Cnty.*, 119 F.3d 862, 866-69 (10th Cir. 1997).

⁵²³ *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989).

detainees in the excessive force context beyond the beginning of pretrial detention while also acknowledging the applicability of substantive due process analysis.⁵²⁴

Furthermore, the Fifth Circuit has noted that in the excessive force context there is some overlap between the applicability of Fourth Amendment and substantive due process standards, and it has used Fourth Amendment standards in cases that, to some degree, implicated substantive due process, at least in part on the basis of policy concerns.⁵²⁵ The Fifth Circuit has done this where the circumstances were such that the concerns vindicated by an excessive force claim under each amendment were largely the same and it was impractical and illogical to draw lines between

⁵²⁴ This language in *Graham* indicates that there might be some overlap between the coverage of the Fourth Amendment and substantive due process principles in the context of law enforcement conduct toward pretrial detainees inasmuch as it indicates that due process principles apply in the context of pretrial detention but that the Court had not decided whether the Fourth Amendment continued to apply after arrest was complete and pretrial detention had begun. Under this interpretation of the rule that a claim which can be characterized as a violation of the Fourth Amendment should be analyzed as such and not as a substantive due process claim, activities occurring during arrest and before pretrial detention are excluded from the realm of substantive due process. Indeed, the Court has used language indicating that the rule foreclosing substantive due process analysis turns on the existence of an explicit constitutional protection. See *id.* at 395 ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."). One might argue that the Fourth Amendment does not provide explicit protections to pretrial detainees after the arrest or seizure is over, and thus that Fourth Amendment analysis might still be permissible in addition to substantive due process analysis. Indeed, prior to the Supreme Court's articulation of the rule in *Graham* foreclosing substantive due process analysis when another amendment explicitly covers the claim, the Court expressly, separately considered whether certain practices in conjunction with pretrial detention violated the Fourth Amendment or constituted pretrial punishment under the Due Process Clause, see *Bell*, 441 U.S. at 558-62.

⁵²⁵ *Petta v. Rivera*, 143 F.3d 895, 911-14 (5th Cir. 1998). Indeed, the Fifth Circuit has indicated that the lines between Fourth Amendment and substantive due process analysis can be blurred depending on the factual context and acknowledged that it "ha[s] applied Fourth Amendment standards to excessive force claims that may have in part implicated the due process clause," such as a claim where it is arguable that some of the plaintiffs were not seized because they were not arrested when police entered a building in search of a suspect and arrested one person while subjecting bystanders to violent behavior and thus the claims were more properly analyzed under the Due Process clause. *Id.* at 912 (citing *Mouille v. City of Live Oak*, 918 F.2d 548 (5th Cir. 1990)).

the two amendments.⁵²⁶ This is the case for claims of an arrestee that would implicate the Fourth Amendment and claims of others, such as bystanders or those in a vehicle driven by an arrestee shot at by police officers, but were not seized and were thus subject to due process principles.⁵²⁷ Indeed, perp walks involving collusive conduct between law enforcement and the media, such as choreographed perp walks, implicate the same concerns regardless of when they are conducted, for instance vis-a-vis the initial arrest or arraignment/probable cause hearing—chiefly, that law enforcement conduct in collusion with the media to facilitate the media's observation and capturing images of a perp walk are unrelated to the legitimate purposes for transporting a suspect in custody or other legitimate or nonpunitive purposes. Indeed, employing different standards under such circumstances might be impractical and illogical.⁵²⁸ Thus, even if a perp walk were found to fall under

⁵²⁶ *Id.* at 911-14 (“[U]nder the particular facts here, we see no principled reason for drawing an analytical distinction between the Petta children’s due process claim and an arrestee’s Fourth Amendment claim, given the substantially similar concerns implicated by the two claims (e.g., the right to be free from excessive force in an arrest situation and the need for a police officer to use reasonable force in effecting arrests.”).

⁵²⁷ *Id.*

⁵²⁸ The Fifth Circuit’s application of Fourth Amendment principles to cases that should be controlled by substantive due process principles based on a nebulous assertion of policy considerations further obfuscates a confusing area of law. However, the Fifth Circuit does give some guidance as to when it is likely to apply—i.e., where the concerns vindicated by a claim under each amendment were largely the same and it was impractical and illogical to draw lines between claims under the two amendments. This might not be the case for a garden variety excessive force case where during an arrest, an officer’s ability to respond to an unpredictable and rapidly evolving situation is paramount and the risk of escape and injury to the officers that might necessitate the use of force is high but such concerns are certainly less (although still present) once the suspect is in pretrial detention and under the control of law enforcement. However, the perp walk situation might be distinguished from the types of cases where the Fifth Circuit has applied Fourth Amendment principles to a case governed by due process rules inasmuch as such cases involved individuals who were not—or arguably were not—seized at any point, but were affected by law enforcement conduct in effecting an arrest of another. Like a garden variety excessive force case, the perp walk context involves the change in status of an individual from arrestee to pretrial detainee. Indeed, in cases involving an arrestee and others, conduct with respect to the arrestee is necessarily governed by the Fourth Amendment, so applying due process analysis to others involved in the same events creates impracticality not present in the perp walk context. However, in a related context, under the same reasoning, the Fifth Circuit

substantive due process principles, strictly speaking, some courts might nonetheless apply the Fourth Amendment rules of decision instead of a substantive due process analysis.⁵²⁹

Finally, perhaps due to the confusion regarding the applicable standard, some courts have analyzed excessive force under both substantive due process and Fourth Amendment standards, even though they believed substantive due process principles to apply.⁵³⁰ Thus, even where it may appear that substantive due

borrowed Eighth Amendment standards in treating excessive force claims under the due process clause . . . because the concerns vindicated by a convicted prisoner's excessive force claim under the Eighth Amendment and those vindicated by a pretrial detainee's excessive force claim under the due process clause are largely the same: the need to guide the proper application of force in maintaining jail security.

Petta, 143 F.3d at 913 (citing *Valencia v. Wiggins*, 981 F.2d 1440, 1446 (5th Cir. 1993)). The Fifth Circuit "therefore adjudged it 'impractical' to adopt different criteria for pretrial detainees, even though their claims are brought under the Fourteenth Amendment." *Id.* The Fifth Circuit noted that "there is no reason to distinguish between pretrial detainees and convicted inmates in reviewing challenged security practices because there is no basis to conclude that pretrial detainees pose any lesser security risk that [*sic*] convicted inmates." *Valencia*, 981 F.2d at 1446. Indeed, there is no reason to distinguish between arrestees and pretrial detainees in the perp walk context—the interests of the suspect implicated are the same and conduct in collusion with the media to facilitate the media's viewing and obtaining images of a perp walk is equally unrelated to the legitimate purposes for the transportation of a suspect in custody. However, courts other than the Fifth Circuit might not entertain such analysis which certainly leads to uncertainty and dilutes the Supreme Court's rules regarding the applicability of substantive due process analysis. Likewise, even a court following *Petta* might be reluctant to expand its principles beyond the specific situations in which the Fifth Circuit has applied them, which are distinguishable from the perp walk context.

⁵²⁹ It can be argued that the Fifth Circuit's analysis in *Petta* is inconsistent with the Supreme Court's decision in *Lewis*, which was decided shortly before the Fifth Circuit decided *Petta*. In *Lewis*, the Supreme Court held that due process standards covered a case involving a passenger of an arrestee who was not seized and applied the conventional substantive due process standard for an excessive force case. 523 U.S. 833, 842-845 (1998). However, the Fifth Circuit in *Petta* cited *Lewis*. *Petta*, 143 F.3d at 901 n.5. Indeed, *Petta* acknowledged that claims by individuals who were not seized are substantive due process claims, but merely indicated that Fourth Amendment principles could apply in substantive due process cases, depending on policy concerns. *See* 143 F.3d at 911-14. *Lewis* does not appear to expressly disallow this although it certainly casts doubt on the analysis in *Petta* and other Fifth Circuit decisions cited in it.

⁵³⁰ *See* *Smith v. Holzapfel*, 739 F. Supp. 1089, 1094-95 (E.D. Tex. 1990); Brown, *supra* note 504, at 1270 n.86 ("Other courts have covered all the bases by considering these claims under both the fourth amendment and due process standards.").

process standards govern a given perp walk, the Fourth Amendment analysis may still be relevant.

C. Preconviction Punishment Beyond Choreographed and Staged Perp Walks

The above analysis indicates that choreographed and staged perp walks as well as other types of collusion by law enforcement in the perp walk context, such as that regarding the exhibition and distribution of a videotape of a perp walk by law enforcement to the media at issue in *Caldarola*, may constitute unconstitutional preconviction punishment, at least under some circumstances. While these perp walks involving collusion between law enforcement officers and the press are the most unnecessary and potentially the most humiliating perp walks, associated or related forms of perp walks are also humiliating to suspects. For instance, perp parades and physical force used by law enforcement officers against a suspect to aid or facilitate the observation or capture of images of the suspect during a perp walk constitute preconviction punishment.⁵³¹ These situations do not serve any legitimate non-

⁵³¹ It should be noted that as is the case with reasonableness under the Fourth Amendment, see *supra* note 417, certain actions relating to choreographed perp walks that occur in the context of facilitating the ability of the media to observe or capture images of the transportation of a suspect in custody, such as the use of force or extending the route of transport, which occurs in a perp parade, do not necessarily constitute pretrial punishment when performed in connection with a perp walk outside of the context of choreographed perp walks (or related conduct) or facilitating the observation or capture of images of the perp walk by the media (even though they might have such an effect). For instance, the use of force during a perp walk does not constitute impermissible pretrial punishment when it is used to control an unruly or resisting suspect although the force might have the result of facilitating the ability of the media to capture images of the suspect or his face, as such a use of force is reasonably related to the a legitimate nonpunitive governmental purpose. The amount and type of force used go to excessiveness. Of course, in the context of such actions, as always, an express intent to punish renders an action pretrial punishment.

Furthermore, as discussed above, there is an argument that scope of choreographed, collusive, collaborative, and cooperative conduct could be defined narrowly such that under certain circumstances, conduct associated with choreographed perp walks, such as the use of physical force to facilitate the capturing of images of a suspect by the media, perp parades, and delaying a movement of a suspect in custody in aid of the media's ability to view and capture images of the movement, might not constitute choreographed, collusive, collaborative, or cooperative conduct. See *id.* However, as is the case under the Fourth Amendment, the scope of what is considered collaborative or

punitive purpose. Likewise, they cause an imposition on the suspect (as well as an increased imposition on the suspect beyond the legitimate transportation of a suspect in custody) that is more than *de minimis*, and significantly beyond and/or independent of the inherent discomfort of pretrial detention. Thus, they constitute preconviction punishment under *Bell* for the same reasons discussed above as in the contexts of choreographed and staged perp walks and other forms of collaboration.

However, the classes of perp walks analyzed in this Part so far also violate the Fourth Amendment under the Supreme Court's analysis in this area. The preconviction punishment approach provides suspects broader protection against the evils of perp walks as it renders unconstitutional some types of perp walks that do not violate the Fourth Amendment. Any perp walk that is objectively reasonable does not violate the Fourth Amendment. As discussed above, law enforcement conduct in transporting a suspect in custody might be objectively reasonable although performed with the express intention to punish, shame, or humiliate the detainee. For instance, a police officer might decide to lead a suspect through an entrance to a building because he knows that the press is gathered outside that entrance and intends to punish, shame, or humiliate the suspect by increasing his exposure to the press while being transported in custody. While selection of that entrance is likely objectively reasonable under the Fourth Amendment, this law enforcement act very well constitutes pretrial punishment. Under *Bell*, any government action taken with the express intent to punish, by definition, is taken for the purpose of punishment. Thus, any act taken with the express intent to punish, shame, or humiliate the suspect in the perp walk context, for instance by parading him in front of the press while in custody, is taken for the purpose of punishment.⁵³² Therefore,

collusive conduct has little or no import with respect to pretrial punishment analysis concerning such actions as are wholly unrelated to any legitimate nonpunitive purpose regardless of whether one would consider them collaborative or not.

⁵³² The Supreme Court has defined the "infliction of punishment" as "a deliberate act intended to chastise or deter." *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)). Thus, an intention to deter, rendering an act a deliberate one to deter constituting punishment, appears to constitute an intention to punish. One might argue that, strictly speaking, express intent to

punish does not include the more specific intents to shame or humiliate or parade a suspect before the press (or facilitate the viewing of the suspect by the press). Indeed, a subtle difference may be recognized between an express intent to punish and the more specific express intents to punish by shame or humiliation, punish by parading before the press, and punish by the humiliation engendered by parading before the press, on one hand, and the express intents to merely shame or humiliate or parade before the press, on the other.

However, courts do not appear to apply such a narrow view of an express intent to punish for the purposes of *Bell*. As discussed above, public humiliation is viewed as a form of punishment. See *supra* Part IV.B. Indeed, as noted in *Demery*, courts recognize that shaming and humiliation are forms of punishment. 378 F.3d at 1032 n.5 (quoting *Smith v. Doe I*, 538 U.S. 84, 98 (2003)). The *Demery* court went on to state that “[a]lthough a regulation that has the incidental effect of shaming may not be a form of punishment, . . . when the government acts with the purpose of shaming an unconvicted detainee, it most definitely is committing an act of punishment in violation of the . . . Due Process Clause.” *Id.* This language indicates that an express intent to shame or humiliate a suspect (which, in other words, means that an act is taken with the purpose of shaming or humiliation) is sufficient to render government action pretrial punishment regardless of whether the government action could be viewed as related or incident to a legitimate governmental purpose, as is the case for an intent to punish under *Bell*. Indeed, *Demery* can be interpreted as standing for the proposition that an intent to shame or humiliate is tantamount to an intent to punish. In other words, specific intentions that can be viewed as an intent to punish are taken to constitute an intent to punish for the purposes of a pretrial punishment analysis.

Likewise, an intent to parade a suspect before the press or facilitate the press’s viewing of the transportation of a suspect in custody can be viewed as an intent to punish and an express intent sufficient to render a perp walk punishment, regardless of whether it could be viewed as related or incident to a legitimate government purpose. Indeed, the parading of a suspect before the press or facilitation of the viewing of a suspect by the press necessarily entails shaming and humiliation. The intentions to parade a suspect before the press or facilitate the press’s viewing of the transportation of a suspect in custody are not related to any legitimate non-punitive purpose or the purposes justifying pretrial detention. Moreover, as indicated above, *Demery* can be interpreted as standing for the proposition that an intent to shame or humiliate constitutes an intent to punish. Furthermore, as discussed above, subjecting a prisoner to public humiliation by presenting him as guilty to the public has historically been employed as a means of punishment. A suspect is presented to the public as guilty during a perp walk. Indeed, the parading of a suspect before the press while being transported in custody or facilitating the press’s ability to view or capture images of a perp walk promote the presentation of the suspect to the press and public as guilty. Thus, there is an argument that actions in the perp walk context that humiliate a suspect or exacerbate his humiliation by parading him before the press while being transported in custody or facilitating the ability of the press or public to view or capture images of him under such circumstances, can be classified as historically viewed as punishment. See *supra* Part IV.B. This supports the position that an intent to display the transportation of a suspect in custody to the press or facilitate the press’s ability to observe and capture images of a perp walk is tantamount to an intent to punish.

government actions in transporting suspects in custody that are objectively reasonable under the Fourth Amendment but performed with the express intent to punish, shame, or humiliate the suspect by facilitating the press's viewing of the suspect, constitute pretrial punishment under *Bell*, and are unconstitutional under circumstances where substantive due process standards apply (so long as the imposition on the suspect is more than *de minimis*).⁵³³ Such actions also increase the exposure of the suspect

However, there is at that an intent to display the transportation of a suspect in custody to the press or facilitate the press's ability to observe and capture images of a perp walk without any additional intent to punish, humiliate, or shame, alone is not sufficient to constitute an express intent to punish that alone renders governmental action punishment. Although, as discussed above, such an intent is unrelated to the legitimate non-punitive purposes or the purposes justifying pretrial detention, case law has never held such an intent to be tantamount to an intent to punish. Moreover, unlike shaming and humiliation, which have been historically associated with punishment, and colonial forms of punishment as recognized by case law, in particular, see *Demery*, 378 F.3d at 1032 n.5, there are no such longstanding associations in the specific case of facilitating observation of perp walks by the media. If it were the case that an intention that met the *Bell* analysis in the absence of an express intent to punish, i.e., one unrelated to a legitimate non-punitive governmental objective, always constituted an intent to punish, the *Bell* analysis in the absence of an express intent to punish would collapse, at least to some extent, into the analysis in the presence of such an intention. Thus, in such cases where there is an express intent to facilitate observation by the press, but no express intent to punish, humiliate, or shame, courts may require a showing that the conduct is unrelated to a legitimate nonpunitive purpose, which would likely restrict such perp walks constituting pretrial punishment to those involving staging, choreography, or other collusion or conduct unrelated to a legitimate nonpunitive purpose, as discussed above and below.

However, in many cases, an intention to facilitate the observation of a suspect in custody by the press is part and parcel with an intention to humiliate or shame, which constitutes punishment, as well as an intent to punish, which as discussed above, can be defined as an intent to chastise or deter. Indeed, deterrence of others and the public is a common rationale for perp walks (and staged and choreographed ones as well as other collusive conduct to facilitate the observation and capturing of images of perp walks by the media) advanced by law enforcement. The number of perp walks, other than those involving staging, choreography, or other collusive conduct by law enforcement, that can be demonstrated to entail an intent to facilitate observation of the perp walk by the press, but not an intent to punish, humiliate, or shame, is likely quite small. Thus, this issue would not arise often.

⁵³³ One might view the imposition on a suspect caused by such an action taken with an express intent to punish, shame or humiliate as the increased imposition created by such an action over that caused by the legitimate transportation of the suspect in the absence of such an action.

For instance, a law enforcement officer's decision to lead a suspect out of a door where the press is gathered with an intent to punish, shame, or humiliate the suspect

to the press beyond what is incident to pretrial detention (and can do so significantly). In addition, any act by law enforcement taken for the purpose of punishment can be viewed as causing imposition on the suspect independent of the inherent discomforts of pretrial detention for the purposes of the disability requirement set forth by the Ninth Circuit in *Demery*.⁵³⁴

However, in the absence of express intent to punish, shame, or humiliate, courts would likely consider attendant opportunity for the press to observe the suspect while being transported in custody and capture his image incidental to legitimate pretrial detention and legitimate governmental purposes when the transportation is conducted in a manner that is objectively reasonable

would significantly increase the exposure of the suspect to the press and public while being transported in custody. As discussed above, in the context of staged and choreographed perp walks and related law enforcement conduct, increasing the exposure of a suspect to the press and public while he is being transported in custody can create significant harm. The imposition on a pretrial detainee caused by such an action taken for the purpose of punishment and the increased imposition on the suspect of such a perp walk over one where law enforcement officers did not choose to lead a suspect out of a door where the press is gathered for punitive purposes are not *de minimis*. However, there can be situations where any harm or exacerbation of public exposure caused by the selection of a specific door would be *de minimis*, such as where the increased exposure resulting from the use of one door versus the other would be marginal.

⁵³⁴ See *supra* note 458. The analysis contained in the previous footnote is relevant to the issue of whether a given imposition significantly exceeds the discomforts inherent in confinement under the first requirement of the analysis set forth in *Demery*, although such a requirement can be interpreted as requiring a greater degree of imposition than a *de minimis* requirement. Depending on the amount of imposition on the suspect caused by a given action (or the increased imposition on the suspect beyond that which would occur in the absence of the intentional action), one might argue that the harm or disability caused by the action did not significantly exceed the inherent discomforts of pretrial detention. In the perp walk context, such imposition largely appears to entail the degree of exposure to the press and public. However, as discussed above, any action taken with the express intent to punish can be viewed as independent of the inherent discomforts of confinement of a pretrial detainee. For discussion of relevant issues and caveats, and a relevant counterargument in favor of the position that exacerbation of a harm of a type similar to one inherent in the discomforts of pretrial confinement, which would likely be the case where an act that is reasonable under the Fourth Amendment is taken with the express intent to punish, shame, or humiliate in the perp walk context, is not independent of the inherent discomforts of confinement, see notes 458, 494. It should be noted that under such a view of independence of the inherent discomforts of confinement, an act taken with an express intent to punish, shame, or humiliate that did not cause harm significantly exceeding the inherent discomforts of confinement would not constitute pretrial punishment under the bipartite analysis set forth in *Demery*.

under the Fourth Amendment. After all, legitimate movements of suspects in public places necessarily entail exposure to the press. Furthermore, in the absence of expressed intent to punish, law enforcement actions are not performed with punitive purposes unless they cannot be rationally connected with a non-punitive legitimate governmental purpose or are excessive in relation to such a purpose. By definition, any government conduct in effecting suspect transportation that is objectively reasonable under the Fourth Amendment is rationally connected to a legitimate purpose. This is because objectively reasonable conduct under the Fourth Amendment must be reasonably related to the objectives of the initial lawful seizure or the legitimate movement of the subject, which are obviously non-punitive purposes.⁵³⁵ For instance, as discussed above, the selection of a particular entrance of a building to lead a suspect through can be objectively reasonable and be rationally connected to legitimate governmental purposes related to effecting the transportation of a suspect and security for reasons such as that the officers might be more familiar with a particular entrance, it may be better lit, or closest to police vehicles. Furthermore, especially given that transportation of suspects in custody through public places necessarily entails exposure to the public and the press, government conduct short of collusion with the press, which significantly exacerbates exposure and humiliation, likely will not be found excessive in relation to the government's strong interest in effectively transporting the suspect in custody safely and without escape.⁵³⁶

⁵³⁵ Likewise, the Fourth Amendment reasonableness analysis goes to the excessiveness of the law enforcement conduct at issue inasmuch as it entails "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989).

⁵³⁶ While some of the additional factors identified in *Bell* indicate that some aspects of legitimate perp walks might be punitive, such factors alone are generally not sufficient to render a legitimate perp walk punitive for the purposes of *Bell*. See *supra* note 488 and accompanying text. This also applies to law enforcement actions (in the absence of express intent to punish, shame or humiliate) in the context of a legitimate perp walk that might increase public exposure (and hence humiliation) of the suspect. Indeed, the *Bell* Court indicated that maintaining security and order in a detention facility and operating it in a manageable fashion are "considerations [] peculiarly within the province and professional expertise of corrections officials, and in the absence of

substantial evidence . . . to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Bell v. Wolfish*, 441 U.S. 520, 540 n.23 (1979) (internal citations and quotation marks omitted). This principle seems applicable in the perp walk context, which unquestionably implicates security and escape concerns, but during transportation of a suspect in custody as opposed to detention at a facility. Thus, in the absence of an express intent to punish, shame, or humiliate, a court will not likely question government conduct in connection with legitimate perp walks short of collusion, and will not require law enforcement to conduct a perp walk in the manner that creates the least public exposure or humiliation to avoid running afoul of constitutional pretrial punishment standards. For instance, as discussed above, the selection of a particular entrance of a building can be rationally connected to legitimate governmental purposes and does not seem disproportional to such purposes, like confinement of a pretrial detainee in a dungeon in chains and shackles is with respect to legitimate purposes that it serves, as stated in *Bell. Id.* at 539 n.20.

It should be noted that there is a complicated circuit split with respect to the interplay between the *Bell* preconviction punishment standard and the standard governing the conditions of confinement of convicted prisoners under the Eighth Amendment requiring proof that officials were deliberately indifferent to a serious hazard created by such conditions and with respect to the applicability of the latter standard in cases involving pretrial detainees in lieu of or as an adjunct to the *Bell* analysis in determining whether due process requirements applicable in the context of pretrial detention are satisfied. Such issues are beyond the scope of this Article, but for further discussion, see David C. Gorlin, Note, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417 (2009). In the context of pretrial detainees, the deliberate indifference standard is especially relevant and applied in cases involving the provision of basic human needs, such as adequate food, clothing, medical care, shelter and living space, and reasonable safety. For instance, in *Hamm v. DeKalb Cnty.*, 774 F.2d 1567 (11th Cir. 1985), the Eleventh Circuit found that application of the *Bell* standard to the provision of basic necessities, such as food, living space, and medical care, is exceedingly difficult and does not yield clear results because a "decision to maintain at a reasonable level the quality of food, living space, and medical care rather than improve or increase its provision of those necessities serves a legitimate purpose: to reasonably limit the cost of detention." *Id.* at 1573. Accordingly, the Eleventh Circuit found that a state's interest in reasonably limiting the costs of pretrial detention was a legitimate governmental interest under *Bell. Id.* Nonetheless, the Eleventh Circuit acknowledged that certain legitimate state objectives may justify the imposition of certain conditions only if the conditions are not too severe. *Id.* The court also stated that there must be a minimum standard for providing detainees with basic necessities in order for due process to be satisfied. *Id.* This view is consistent with *Bell*. The court found that in the context of providing pretrial detainees with such basic necessities as food, living space, and medical care, the minimum standard permitted by the Due Process Clause for pretrial detainees is the same as that under the Eighth Amendment for convicted persons, which is a deliberate indifference standard. *See id.* at 1573-74. Likewise, in *Butler v. Fletcher*, 465 F.3d 340 (8th Cir. 2006), the Eighth Circuit found that deliberate indifference is the appropriate standard of culpability for all claims that prison officials failed to provide pretrial detainees with adequate food,

clothing, shelter, medical care, and reasonable safety. *Id.* at 345. The court declined to apply the *Bell* analysis in such a situation on the basis that the governmental duty to detainees with respect to such matters, including the government's duty to protect a pretrial detainee from disease, is not based on a pretrial detainee's right to be free from punishment. *Id.* at 349. Instead, such a duty "is grounded in principles of safety and general well-being: [and] 'when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself and fails to provide for such basic human needs . . . it transgresses the substantive limits on state action . . .'" imposed by the Eighth Amendment and Due Process Clause. *Id.* at 344-45 (quoting *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989)). Thus, the Eighth Circuit found that pretrial detainees and convicted inmates have the same right to such basic human needs and that accordingly the same standard of care, deliberate indifference, is appropriate. *Id.* at 345. However, in cases not involving basic human needs, the Eleventh and Eighth Circuits have applied the *Bell* standard. *See, e.g., Morris v. Zefferi*, 601 F.3d 805, 810-11 (8th Cir. 2010); *Magluta v. Samples*, 375 F.3d 1269, 1273-77 (11th Cir. 2004). On the other hand, for example, the Third Circuit rejected the proposition that the same standard governs the constitutionality of conditions of confinement of pretrial detainees and convicted prisoners and found that the *Bell* standard governs conditions of confinement for pretrial detainees, indicating that the Eighth Amendment provides a floor for the due process inquiry as pretrial detainees are entitled to at least as much protection as convicted inmates. *See Hubbard v. Taylor*, 399 F.3d 150, 164-67 (3d Cir. 2005).

Perp walks do not implicate basic needs, but rather are part and parcel with pretrial punishment. Thus, the Eighth Circuit authority supporting the application of the Eighth Amendment deliberate indifference standard to some claims by pretrial detainees discussed above supports application of the *Bell* standard in the perp walk context. Indeed, in the perp walk context, analysis of deliberate indifference to a detainee's needs seems unwieldy. Thus, the perp walk context is more suited to analysis under *Bell*, which remains the controlling Supreme Court precedent. Indeed, a district court picked up on the differential applicability of *Bell* and deliberate indifference standards, indicating the latter standard is applicable in the context of deliberate indifference to health and safety, noting that both state action with the impermissible intent to punish a detainee and deliberate indifference to a detainee's safety can give rise to a due process violation. *See Baskin v. Wayne Cnty.*, No. 05-70475, 2006 U.S. Dist. LEXIS 71787, at *10 (E.D. Mich. Sept. 29, 2006).

The Fifth Circuit has taken the unique position that *Bell* applies in the context of the rights of pretrial detainees to medical care and protection from harm only when a pretrial detainee attacks general conditions, practices, rules, or restrictions of confinement but that a deliberate indifference standard applies to episodic acts or omissions by a jail official. *See, e.g., Hare v. City of Corinth*, 74 F.3d 633, 643-48 (5th Cir. 1996) (en banc). However, the Fifth Circuit articulated this rule specifically in the context of the right to be secure in basic human needs, such as medical care and safety, *see id.* at 647-48 ("We hold that the episodic act or omission of a [] jail official does not violate a pretrial detainee's constitutional right to be secure in his basic human needs, such as medical care and safety, unless the detainee demonstrates that the official acted or failed to act with deliberate indifference to the detainee's needs."), which as discussed above, are not implicated by perp walks. Moreover, other courts do not make such a distinction and apply *Bell* to episodic acts. *See, e.g., Morris*, 601 F.3d at 809-11

CONCLUSION

The fact that perp walks have received relatively little attention from the courts probably can be explained, at least in part, by the fact that the remedies for an unconstitutional perp walk do not include reversal of a criminal conviction or release from confinement.⁵³⁷ Rather, the remedies include injunctions requiring the state to cease conducting unconstitutional perp walks and

(applying *Bell* in the context of transportation of a pretrial detainee in an unsanitary dog cage); *Rush v. Astacio*, No. 97-2661, 1998 U.S. App. LEXIS 18588, at *3-5 (2d Cir. July 31, 1998) (applying *Bell* in the context of an arresting officer's refusal to feed a pretrial detainee and keeping him in a cold room).

It should be noted that courts consider the *Bell* standard and the deliberate indifference standard to be roughly equivalent. *See, e.g., Hart v. Sheahan*, 396 F.3d 887, 892 (7th Cir. 2005) ("[T]he standards applicable to complaints by convicts and by pretrial detainees about unsafe conditions of confinement merge."); *Hare*, 74 F.3d at 646 ("Properly understood, the *Bell* test is functionally equivalent to a deliberate indifference inquiry."). Indeed, even if a court were to attempt to apply a deliberate indifference standard in the perp walk context, the results would be identical or nearly identical to those obtained by the *Bell* analysis. As discussed above, law enforcement conduct in effecting the transportation of a suspect in custody is intentional. Staged and choreographed perp walks and related law enforcement conduct as well as other actions taken with the intent to punish, shame, or humiliate obviously evince deliberate indifference. Such deliberate indifference would be with respect to the erosion of the presumption of innocence as well as shaming and humiliation. Given the necessity of transportation of a suspect in custody and the legitimate reasons for law enforcement officers to make decisions resulting in exposure or increased exposure of the transportation of a suspect in custody to the press, it is highly likely that actions not taken with such an intent that might increase exposure to the press would not meet the deliberate indifference standard.

One commentator has suggested that shaming is an area where application of the *Bell* and Eighth Amendment standards to pretrial detainees would yield divergent results, given that some shaming punishments on convicted individuals have been held to comport with the Eighth Amendment. *See Gorlin, supra*, at 429-30. This position is based on the view of some courts that pretrial detainees and convicted inmates have the same rights under some circumstances. *See id.* However, a view that pretrial detainees and convicted prisoners have the same rights in all circumstances would render *Bell's* proscription of pretrial punishment nugatory as punishment of convicted prisoners is permitted so long as it is not cruel and unusual. As discussed above, there is authority indicating that Eighth Amendment and due process standards are the same in certain instances that do not go to punishment—basic human needs—but not in contexts where punishment is implicated. As indicated above, resolution of the legal quagmire concerning the interplay between and applicability of pretrial punishment and deliberate indifference standards in assessing the due process rights of pretrial detainees is beyond the scope of this Article.

⁵³⁷ *See United States v. McVeigh*, 118 F. Supp. 2d 1137, 1154 (D. Colo. 2000).

damages remedies under 42 U.S.C. § 1983⁵³⁸ or *Bivens v. Six Unknown Named Agents*.⁵³⁹ Thus, victims of unconstitutional perp walks who are convicted of crimes have a lesser incentive to challenge the constitutionality of their perp walk than they do to challenge other constitutional violations that may warrant reversal of their conviction. Furthermore, a convicted defendant claiming that he was humiliated or punished during his perp walk is a very unsympathetic plaintiff in a § 1983 or *Bivens* action.⁵⁴⁰ However, as high profile perp walks in white collar cases continue, suspects in these cases who tend to have considerably more resources than other criminals, especially those who are acquitted, might be inclined to challenge their perp walks and further develop the case law in this area.

The Second Circuit is the only federal appellate court to address the constitutionality of government conduct in perp walks. District courts in the Second Circuit as well as other circuits have hitherto employed approaches similar to the one taken by the Second Circuit. Under the perp walk doctrine developed by the Second Circuit and lower courts, staged perp walks, where law enforcement officers transport a suspect in custody in a public place for the sole reason of parading him before the press and not for the purpose of any legitimate movement, are unconstitutional under the Fourth Amendment. However, courts, including the Second Circuit, consider all law enforcement conduct surrounding transportation of a suspect when there is a legitimate law enforcement justification for transporting the suspect constitutional. Thus, choreographed perp walks, where law enforcement officers collude with the press by notifying them of the time and place of a legiti-

⁵³⁸ 42 U.S.C. § 1983 (2006) (providing for damages and injunctive relief for violations of federal constitutional rights).

⁵³⁹ 403 U.S. 388 (1971).

⁵⁴⁰ Moreover, the Prison Litigation Reform Act, may preclude relief in actions brought by persons in custody stemming from perp walks where there is no showing of physical injury. See 42 U.S.C. § 1997e(e) (2006) ("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."). However, this provision only applies to actions brought during the incarceration of the plaintiff and thus poses no barrier to actions brought by an individual after he is released. See, e.g., *Napier v. Preslicka*, 314 F.3d 528, 531-32 (11th Cir. 2002). The scope and contours of this provision are beyond the scope of this Article.

mate movement of a suspect in custody or scheduling suspect movements to accommodate the press, as well as other collusive conduct by law enforcement with the press, such as the exhibition and distribution of the perp walk videotape at issue in *Caldarola*, comport with the Fourth Amendment under existing perp walk doctrine.

The perp walk doctrine as articulated by the Second Circuit and district courts provides suspects inadequate protection from the humiliation caused by perp walks. Perp walks are a necessary part of the discomfort and reduction in privacy inherent in pretrial detention because a suspect in custody must be transported in public places, such as to and from public court appearances. During these public movements, the press and the public may view the suspect, and the press may capture his image for public dissemination. However, law enforcement collusion with members of the press to facilitate their ability to observe the suspect during transportation and capture his image is wholly unrelated to the legitimate law enforcement purpose of transporting the suspect. Furthermore, such perp walks are likely to be more humiliating for the suspect than unchoreographed perp walks because of the certainty of press attendance during the movement and the increased likelihood that the press will widely disseminate images of the suspect obtained. Thus, by permitting choreographed perp walks, the perp walk doctrine allows law enforcement officers to conduct perp walks that are very humiliating for the suspect and wholly unnecessary to detain an individual who is presumed innocent.

However, the perp walk doctrine construes the Fourth Amendment too narrowly and is inconsistent with the Supreme Court's analysis underlying it. Supreme Court precedent requires that the conduct of law enforcement officers in effecting a seizure, including the transportation of a suspect in custody, relate to the purpose of the seizure. Thus, in the perp walk context, the actions of the officers involved must be related to the goal of effectively transporting the suspect. Law enforcement collusion with the press to coordinate perp walks so that the press may more easily capture images of the suspect as well as other law enforcement conduct in collaboration or cooperation with the press to facilitate the obtaining of images of a perp walk by the press simply does

not relate to the purpose of transporting a suspect legitimately or of a lawful underlying seizure. Therefore, the Supreme Court's Fourth Amendment jurisprudence suggests that choreographed perp walks and related collusive conduct by law enforcement with the press, such as the exhibition and distribution of the videotape at issue in *Caldarola*, do not comport with the Fourth Amendment.

Likewise, while courts have yet to analyze perp walks as preconviction punishment under the Due Process Clauses, the purposes advanced for perp walks are frequently punitive and advance the punitive goals of retribution and deterrence. Indeed, choreographed and staged perp walks and related law enforcement conduct may constitute unconstitutional pretrial punishment, at least under some circumstances. Furthermore, law enforcement conduct promoting observation of a suspect in custody by the press, which falls short of direct collaboration between law enforcement and the press, may constitute unconstitutional pretrial punishment when there is evidence of an intention to punish, shame, or humiliate the suspect, for instance by facilitating viewing of the suspect by the press on the part of law enforcement officers, at least under some circumstances. In this way, unconstitutional preconviction punishment analysis may foreclose more law enforcement activity regarding perp walks than Fourth Amendment analysis which only forecloses choreographed and staged perp walks.

Although the Supreme Court's Fourth Amendment jurisprudence and preconviction punishment analysis provide suspects with considerably more protection against law enforcement conduct leading to humiliating perp walks than the perp walk doctrine employed by the Second Circuit and district courts, they do not completely protect suspects against the inequities and evils associated with perp walks. Police and prosecutors are free to exercise discretion as to the cases in which suspects are subjected to perp walks. For instance, law enforcement may still permit certain suspects to turn themselves in privately without a perp walk while arresting others in efforts to manipulate public opinion as long as punitive intent is not expressed. A public arrest and subsequent transportation of a suspect is objectively reasonable under the Fourth Amendment and inherent in pretrial detention. Fur-

thermore, neither doctrine requires law enforcement officers to use their best efforts to safeguard a suspect's privacy and prevent the press from viewing him while being transported in custody. The Fourth Amendment merely requires law enforcement actions be reasonable, and the Due Process Clauses require that they not be punitive. Law enforcement conduct related to transportation of suspects in custody can facilitate the press's observation of such suspects without being unreasonable or punitive.

PATERNALISTIC MANIPULATION THROUGH PICTORIAL WARNINGS: THE FIRST AMENDMENT, COMMERCIAL SPEECH, AND THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT

INTRODUCTION.....	1910
I. BACKGROUND	1915
A. <i>An Overview of the Commercial Speech Doctrine</i>	1915
B. <i>First Amendment Limitations on Commercial Speech, Compelled Disclosure, and Suppression</i>	1916
II. THE UNCONSTITUTIONALITY OF THE FDA'S WARNINGS UNDER ZAUDERER'S "REASONABLE RELATION" STANDARD.....	1922
A. <i>First Requirement of Zauderer: The State's Interest is Not to Prevent Consumer Deception</i>	1922
B. <i>Second Requirement of Zauderer: The Warning Requirement is Not Reasonably Related to the Alleged State Interest in Preventing Consumer Deception</i>	1924
III. THE UNCONSTITUTIONALITY OF THE FDA'S WARNINGS UNDER WOOLEY'S STRICT SCRUTINY STANDARD.....	1925
A. <i>First Requirement of Wooley: The Government's Failure to Demonstrate a Compelling State Interest</i>	1925
B. <i>Second Requirement of Wooley: The Warning Requirement is Not Narrowly Tailored</i>	1926
C. <i>The Unconstitutionality of Using Tobacco Packages as Billboards and Other Narrowly Tailored Means Available</i>	1928
IV. THE UNCONSTITUTIONALITY OF THE FDA'S WARNINGS UNDER CENTRAL HUDSON'S INTERMEDIATE SCRUTINY STANDARD	1930
A. <i>The Second Prong of Central Hudson: The Government's Failure to Demonstrate a Substantial State Interest</i>	1931
B. <i>The Third Prong of Central Hudson: The Warning Requirement Fails to Directly Advance the State's Interest</i>	1932

<i>C. Fourth Prong of Central Hudson: The Warning Requirement is More Extensive than Necessary to Serve the State's Interest</i>	1933
V. AVAILABLE OPTIONS TO PREVENT CONSUMER DECEPTION.....	1934
<i>A. Taxation of Tobacco Products</i>	1934
<i>B. Banning of Tobacco Products</i>	1935
<i>C. Use of Removable Package Inserts</i>	1937
<i>D. Consumer Health and Wellness Educational Programs</i>	1937
<i>E. Raising the Penalties for Adolescent Tobacco Sales</i>	1938
CONCLUSION.....	1939

INTRODUCTION

Imagine visiting your neighborhood grocery store to buy snacks and beer for a special occasion. On the snack aisle, you select a box of Oreos from the middle shelf. On the cookie package, you see an image of a pallid male cadaver, his autopsy incision bound together by thick staples and black thread. Looking further down the aisle, you notice Twinkie boxes displaying prominent images of damaged and diseased hearts and Cheetos bags depicting the morbidly obese. Virtually every guilty pleasure you observe displays the diseased, the dead, or the dying. Next, you go to the liquor department to pick up a six-pack of beer. The case of Budweiser you select displays two images: a dead fetus and a car mangled into a heap of glass, metal, and rubber. Have you been warned that your sweet treat may thicken the cholesterol building in your arteries, causing atherosclerosis, and ultimately a heart attack? That your favorite beer may kill an unborn child, a loved one, or even yourself? Or, in contrast, have you been manipulated? Beginning in 2012, tobacco companies must implement pictorial warnings similar to those described above on all cigarette and smokeless tobacco products.¹ The warnings attempt to

¹ A federal district court recently found that the possible implications of the Family Smoking Prevention and Tobacco Control Act [hereinafter Act] were indeed frightening. The court discussed in dicta that:

when one considers the logical extension of the Government's defense of its compelled graphic images to possible graphic labels that the Congress and

paternalistically manipulate consumers and should be held unconstitutional under Supreme Court commercial speech precedent, including: (1) the “reasonable relation” standard of *Zauderer v. Office of Disciplinary Counsel*²; (2) the strict scrutiny standard of *Wooley v. Maynard*³; and (3) the intermediate scrutiny standard for commercial speech disclosure and suppression articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁴

Signed by President Obama on June 22, 2009, the Family Smoking Prevention and Tobacco Control Act—codified in relevant part in 15 U.S.C. § 1333—purports to give the U.S. Food and Drug Administration the authority to require graphic images accompanied by textual warning statements on tobacco packages.⁵

the FDA might wish to someday impose on various food packages (*i.e.*, fast food and snack food items) and alcoholic beverage containers (from beer cans to champagne bottles), it becomes clearer still that the public’s interest in preserving its constitutional protections—and, indeed, the Government’s concomitant interest in not violating the constitutional rights of its citizens—are best served by granting injunctive relief at this preliminary stage.

R.J. Reynolds Tobacco Co. v. FDA, No. 11–1482, 2011 U.S. Dist. LEXIS 128372, at *45 (D.C. Cir. Nov. 7, 2011). “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

² 471 U.S. 626 (1985).

³ 430 U.S. 705 (1977).

⁴ 447 U.S. 557 (1980). Although the Supreme Court in *Wooley* did not label its heightened level of scrutiny as “strict scrutiny,” scholars have argued that the Court actually applied strict scrutiny. *See, e.g.*, Fred H. Cate, *Principles of Internet Privacy*, 32 CONN. L. REV. 877, 880 n.18 (2000); Kara O’Connor Gansmann, *Government Speech. It’s What’s For Dinner: Navigating First Amendment Assertions and Generic Commercial Advertisements Funded by Checkoff Subsidies*, 82 N.D. L. REV. 519, 529 n.80 (2006); Sarah A. Juster, *Free Exercise—Or the Lack Thereof?* Employment Division v. Smith, 24 CREIGHTON L. REV. 239, 245 n.62 (1990).

⁵ Press Release, PR Newswire, American Lung Association Celebrates U.S. Food and Drug Administration’s Final Rule Requiring Graphic Warning Labels on Cigarette Packs (June 21, 2011), available at <http://www.prnewswire.com/news-releases/american-lung-association-celebrates-us-food-and-drug-administrations-final-rule-requiring-graphic-warning-labels-on-cigarette-packs-124268099.html>; *see also* R.J. Reynolds, 2011 U.S. Dist. LEXIS 128372, at *5. *See generally* Cigarette Labels and Advertising, Pub. L. No. 111-31, § 201, 123 Stat. 1776, 1842 (2009) (amending 15 U.S.C. § 1333 (2006)). The Act also:

bars tobacco manufacturers from promoting their brands through sponsorship of ‘athletic, musical, artistic, or other social or cultural event[s]’; from distributing any nontobacco good in exchange for purchase of a tobacco

In small part, the Act provides that “[i]t shall be unlawful for any person to manufacture, package, or import for sale or distribution within the United States any cigarettes” or smokeless tobacco package which fails to bear the appropriate label.⁶ Under the pretext of protecting consumers and through power allegedly given by the Act, the FDA has approved nine color images for placement on “cigarette [and smokeless tobacco] packages manufactured on or after September 22, 2012, and for all cigarette [and smokeless tobacco] packages introduced into commerce on or after October 22, 2012.”⁷ The images include, but are not limited to, an African American man blowing a puff of smoke out of his tracheotomy cavity, a male cadaver with its “Y” autopsy incision fastened together by steel staples, and a jaundiced nodule-covered pair of lungs shown in stark contrast to a healthy set of lungs.⁸

Unlike previous warnings, these images will not appear on the sides of tobacco packages, but instead will cover the top fifty percent of the front and rear panels of cigarette packages, as well as thirty percent of the front and rear panels of smokeless tobacco products.⁹ Within the warning labels are statements to consumers

product; from distributing any brand-name promotional items; from making an ‘express or implied’ statement ‘through the media or advertising’ that ‘conveys’ that the product is ‘less harmful’ because it is regulated by the FDA or complies with the FDA’s prescribed standards; from distributing free samples of their cigarettes; from distributing free smokeless tobacco samples except in very limited circumstances; and from jointly marketing tobacco with any other product regulated by the FDA.

Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 520 (W.D. Ky. 2010) (citation omitted).

⁶ 15 U.S.C. § 1333(a)(1).

⁷ *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *13; see also *Cigarette Health Warnings*, FDA, <http://www.fda.gov/TobaccoProducts/Labeling/CigaretteWarningLabels/default.htm> (last visited May 4, 2012) [hereinafter *Health Warnings*].

⁸ *Id.* The remaining images include the following: a woman holding a small child surrounded by smoke; diseased gums and decaying teeth; an old man with an oxygen mask covering his face; an illustration of a crying baby attached to health-monitoring machines; the symbol for stop: a triangle with a red exclamation mark inside of it; and a man wearing a t-shirt that reads “I quit.” *Id.*

⁹ *Overview of the Family Smoking Prevention and Tobacco Control Act*, FDA, <http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm246129.htm> (last visited May 4, 2012). The new warnings are supposed to replace what the American Lung Association and the FDA deem to be twenty-five-year-old ineffective warnings buried on the sides of tobacco packages. PR Newswire, *supra* note 5.

that include: "WARNING: Cigarettes cause fatal lung disease"; "WARNING: Smoking can kill you"; and "WARNING: SMOKING DURING PREGNANCY CAN HARM YOUR BABY."¹⁰ Each image also "prominently displays '1-800-QUIT-NOW': a telephone number the FDA selected to fulfill its own regulatory obligation to offer smoking cessation assistance on each package."¹¹

In requiring the new warnings, the government has neither defended consumers from manipulative advertising nor informed them in unbiased facts about the dangers of products they have chosen to use. As of March 2012, two federal district courts differ on what Supreme Court analysis to apply to determine the constitutionality of the warnings, while the Sixth Circuit Court of Appeals is divided 2-1 over the constitutionality of the graphic labels.¹² In an attempt to create uniformity among courts

¹⁰ *Health Warnings*, *supra* note 7.

¹¹ *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *13; *Health Warnings*, *supra* note 7. Other warning statements include: "WARNING: Cigarettes are addictive."; "WARNING: Cigarettes cause strokes and heart disease"; "WARNING: TOBACCO SMOKE CAN HARM YOUR CHILDREN"; "WARNING: Cigarettes cause cancer"; "WARNING: Tobacco smoke causes fatal lung disease in nonsmokers"; and "WARNING: Quitting smoking now greatly reduces serious risks to your health." *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *6.

¹² Two federal district courts have come to conflicting conclusions regarding the warnings. In *R.J. Reynolds*, five of the largest tobacco product manufacturers in the United States argued that the Act unconstitutionally compelled commercial speech. *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *26. The court applied strict scrutiny and awarded the plaintiffs a preliminary injunction against the warning requirements. *Id.* at *4-5, 26. In *Commonwealth Brands, Inc. v. United States*, six tobacco manufacturers brought suit challenging the constitutionality of the Act "on free speech, due process, and takings grounds." *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 512 (W.D. Ky. 2010). In part, the plaintiffs in *Commonwealth Brands* contended that the Act's warning label requirement "unjustifiably and unduly burden[ed] Plaintiff's commercial speech . . . [and] unconstitutionally compel[led] Plaintiffs to disseminate the Government's anti-tobacco message." *Id.* at 528 (footnote omitted) (internal quotation marks omitted). The court ultimately found "the warning requirement . . . [to be] sufficiently tailored to advance the government's substantial interest under *Central Hudson*." *Id.* at 532. Unlike *R.J. Reynolds*, *Commonwealth Brands* "was briefed and decided *after* the Act was passed, but *before* the FDA's Rule was promulgated." *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *19-20 n.17. As a result, the plaintiffs in *Commonwealth Brands* "made a facial challenge to the constitutionality of graphic warnings in general," but "were incapable of challenging any of the nine graphic warnings the FDA ultimately selected." *Id.* In February of 2012, the District Court for the District of Columbia once again ruled on the graphic warnings by permanently enjoining the FDA. *R.J. Reynolds*, No. 11-1482, 2012 U.S. Dist. LEXIS 26257, at *4 (D.C. Cir. Feb. 29, 2012). In March of 2012, however, the

considering the constitutionality of the warnings, Parts II and III of this article delve into the complicated area of commercial speech disclosure and propose that courts should apply the *Zauderer* “reasonably related” standard and the *Wooley* strict scrutiny standard as two Supreme Court exceptions to the four-part analysis of *Central Hudson*.¹³ Part II of this Comment explains why the pictorial warnings fail under what this Comment proposes as the first exception to the application of the *Central Hudson* analysis, the “reasonable relation” standard of *Zauderer*.¹⁴ Part III explains how the warnings also fail under the proposed second exception to *Central Hudson*, the strict scrutiny standard of *Wooley*.¹⁵ Part IV explains how the warnings both unconstitutionally compel and suppress commercial speech under *Central Hudson*.¹⁶ Finally, Part V discusses other options better suited to prevent consumer deception and educate consumers about the dangers of tobacco use. This Comment attempts to protect consumers from paternalistic manipulation by the government and ensure the protection of all free speech, regardless of its popularity. In the oft misquoted words of Voltaire, “I disapprove of what you say, but I will defend to the death your right to say it.”¹⁷

Sixth Circuit heard *Commonwealth Brands* on appeal and upheld the constitutionality of the warnings. *Disc. Tobacco City & Lottery v. United States*, Nos. 10-5234/10-5235, 2012 U.S. App. LEXIS 5614, at *3 (6th Cir. Mar. 19, 2012). The Sixth Circuit appears, however, to base its decision on the importance of preventing underage smoking. *Id.* at *7-8. The court of appeal’s reliance on preventing underage tobacco consumption is problematic, as the Constitution requires more than just looking at whether one particular group “will be affected by the challenged legislation.” *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006). The warnings also fail under tailoring requirements, since other reasonable options like taxation and educational campaigns exist to educate consumers about the dangers of using tobacco products.

¹³ See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980); *Wooley v. Maynard*, 430 U.S. 705 (1977).

¹⁴ See *Zauderer*, 471 U.S. at 651; *Cent. Hudson*, 447 U.S. at 566.

¹⁵ See *Wooley*, 430 U.S. at 705.

¹⁶ See *Cent. Hudson*, 447 U.S. at 566.

¹⁷ *People & Politics Top 10 Famous Historic Misquotes*, LISTVERSE (May 15, 2008), <http://listverse.com/2008/05/15/top-10-famous-historic-misquotes/>. Voltaire actually said “Think for yourselves and let others enjoy the privilege to do so too.” *Id.* This misquote can be accredited to “a 1907 book called *Friends of Voltaire*, by Evelyn Beatrice Hall.” *Id.* (emphasis added).

I. BACKGROUND

A. An Overview of the Commercial Speech Doctrine

The Supreme Court has long recognized that tobacco advertising qualifies as commercial speech.¹⁸ Commercial speech serves the speaker's economic interests and assists in the education of consumers by promoting the greatest possible dissemination of information.¹⁹ Commercial compelled disclosure, in particular, provides state and federal governments with the ability to warn unsuspecting consumers about the potential dangers of certain products.²⁰ In *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court held for the first time that the First Amendment, which pertains to states through the Fourteenth Amendment, shields commercial speech from unjustified governmental regulation.²¹

Both images and the choice to not speak are afforded the same constitutional protections as traditional commercial speech, but commercial speech that is false, misleading, or about illegal

¹⁸ See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533-34 (2001); *Consol. Cigar Corp. v. Reilly*, 218 F.3d 30, 37-38 (1st Cir. 2000); *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 520 (W.D. Ky. 2010).

¹⁹ *Cent. Hudson*, 447 U.S. at 561-62.

²⁰ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641 (1985). For a brief explanation of compelled disclosure law, see HENRY COHEN, CONG. RESEARCH SERV., RL95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT (2009), available at <http://fpc.state.gov/documents/organization/110843.pdf>. The constitutionality of nutritional posting requirements has also been debated. For an article discussing compelled disclosure of nutritional values, see Charles R. Yates III, *Trimming the Fat: A Study of Mandatory Nutritional Disclosure Laws and Excessive Judicial Deference*, 67 WASH. & LEE L. REV. 787 (2010). In the future, commercial speech will likely be an issue in high fructose corn syrup regulation since scholars have argued that the title of "corn sugar" manipulates consumers. See, e.g., Emily Fredrix, *Corn Syrup Producers Want Sweeter Name: Corn Sugar*, USA TODAY, Sept. 17, 2010, http://www.usatoday.com/money/advertising/2010-09-14-corn-syrup_N.htm; Thomas Watkins, *'Corn Sugar' is False Advertising, FDA Warns*, ASSOCIATED PRESS, Sept. 15, 2011, <http://www.msnbc.msn.com/id/44543271/ns/business-retail/t/corn-sugar-false-advertising-fda-warns/#.Tzg7uYHfUrU>.

²¹ *Cent. Hudson*, 447 U.S. at 561 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-762 (1976)).

activities is not constitutionally protected.²² Although commercial advertising is not afforded protection as great as other forms of speech—such as social, religious, or political speech—the Court has expressly rejected the paternalistic view that the government has the complete power to suppress commercial speech.²³ Even when commercial speech communicates only a partial version of the relevant facts, the First Amendment assumes that an incomplete version of truthful information is superior to no information at all.²⁴

*B. First Amendment Limitations on Commercial Speech,
Compelled Disclosure, and Suppression*

In evaluating the tobacco warnings, two federal district courts and the Sixth Circuit Court of Appeals have divided over which Supreme Court compelled disclosure analysis to apply: the “reasonable relation” standard of *Zauderer*, the strict scrutiny standard of *Wooley*, or the intermediate scrutiny standard of *Central Hudson*.²⁵ Under *Zauderer*, a compelled disclosure is

²² *Zauderer*, 471 U.S. at 648; *R.J. Reynolds Tobacco Co. v. FDA*, No. 11-1482, 2011 U.S. Dist. LEXIS 128372, at *21 (D.C. Cir. Nov. 7, 2011). For commercial speech to be protected by the First Amendment, “it at least must concern lawful activity and not be misleading.” *Lorillard Tobacco Co.*, 533 U.S. at 554 (citing *Cent. Hudson*, 447 U.S. at 566). “The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading . . . or that proposes an illegal transaction.” *Zauderer*, 471 U.S. at 638. The Eleventh Circuit noted:

If actually misleading, such speech would not be protected by the first amendment, but if only potentially misleading, the state must craft some narrow restriction on the speech—short of the current outright ban—which will directly advance its interest in protecting the public while encouraging a free flow of commercial information.

Abramson v. Gonzalez, 949 F.2d 1567, 1576-77 (11th Cir. 1992).

²³ *Lorillard Tobacco Co.*, 533 U.S. at 577; *Cent. Hudson*, 447 U.S. at 557 & 562. “The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.” *Cent. Hudson*, 447 U.S. at 563 (citation omitted).

²⁴ *Id.* (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 374 (1977)).

²⁵ See, e.g., *Disc. Tobacco City & Lottery v. United States*, Nos. 10-5234/10-5235, 2012 U.S. App. LEXIS 5614, at *3 (6th Cir. Mar. 19, 2012) (dividing 2-1 over what commercial speech standard to apply); *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *26 (applying strict scrutiny to analyze the warnings); *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 532 (W.D. Ky. 2010) (applying *Central Hudson* to analyze the constitutionality of the warnings). See generally *Zauderer*, 471 U.S. at 651; *Cent. Hudson*, 447 U.S. at 566; *Wooley v. Maynard*, 430 U.S. 705, 706 (1977).

constitutional if it is "reasonably related to the State's interest in preventing deception of consumers."²⁶ When strict scrutiny is required under *Wooley*, however, the government must demonstrate that the regulation "is narrowly tailored to achieve a compelling governmental interest."²⁷ In contrast, *Central Hudson* applies an intermediate scrutiny standard that requires the court to determine: (1) whether the disclosure concerns a lawful activity; (2) if the "governmental interest is substantial"; (3) if "the regulation directly advances" the state's interest; and (4) if the regulation is more than "necessary to serve" the government's interest.²⁸

The Supreme Court has made two distinctions concerning when to apply *Zauderer* versus when to apply *Central Hudson*: (1) one distinction requires a *Zauderer* analysis for regulation of "misleading commercial speech," but a *Central Hudson* analysis for the regulation of "[non-]misleading speech," while (2) the other applies *Zauderer* to mandatory disclosures and *Central Hudson* to the suppression or restriction of speech.²⁹ Many state and lower federal courts have rejected the misleading versus non-misleading distinction, and instead have accepted the distinction between whether the regulation is a compelled disclosure or speech suppression.³⁰ In addition, federal courts have articulated differing standards concerning when to apply *Wooley* versus *Zauderer*: (1) some courts apply *Wooley* strict scrutiny to "subjective and highly controversial information"³¹ and *Zauderer*

²⁶ *Zauderer*, 471 U.S. at 651. For examples of the application of *Zauderer*, see *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009); *Bellsouth Adver. & Publ'g Corp. v. Tenn. Regulatory Auth.*, 79 S.W.3d 506, 519 (Tenn. 2002).

²⁷ *Wooley*, 430 U.S. at 706; *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *27.

²⁸ *Cent. Hudson*, 447 U.S. at 566.

²⁹ *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339 (2010) (emphasis omitted) (applying *Zauderer* to a disclosure requirement directed at misleading commercial speech); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 508 (1996) (recognizing *Central Hudson* as applicable to suppression of nonmisleading commercial speech); *Edenfield v. Fane*, 507 U.S. 761, 768-69 (1993) (applying *Central Hudson* to the suppression of nonmisleading commercial speech).

³⁰ "[W]e have found no cases limiting *Zauderer* [to 'potentially deceptive advertising directed at consumers']." *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005); see also *N.Y. State Rest. Ass'n*, 556 F.3d at 114; *BellSouth Adver. & Publ'g Corp.*, 79 S.W.3d at 519.

³¹ *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 651 (7th Cir. 2006). "The sticker ultimately communicates a subjective and highly controversial message—that

to “purely factual and uncontroversial information,”³² while (2) others apply *Wooley* only if the government “prescribe[s] what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”³³ Building upon the already complex and confusing distinctions of when to apply *Zauderer*, *Central Hudson*, or *Wooley*, a federal district court in Kentucky—in evaluating the warnings—applied *Central Hudson*, rejected strict scrutiny, and did not state why *Zauderer* was inapplicable, while a federal district court for the District of Columbia applied strict scrutiny, rejected *Zauderer*, and did not explain why *Central Hudson* was considered inapplicable.³⁴

In an attempt to clarify commercial disclosure doctrine, this Comment posits a test for determining the constitutionality of the pictorial warnings. Further, this Comment suggests that commercial compelled disclosure law should be thought of as consisting of the main *Central Hudson* standard, with two exceptions to the application of *Central Hudson*: (1) *Zauderer*’s “reasonable relation” standard and (2) *Wooley*’s strict scrutiny standard.³⁵ Under this Comment’s proposal, disclosures of “purely factual and uncontroversial information” should require application of the *Zauderer* standard, through which a compelled disclosure is constitutional if “it’s reasonably related to the state’s interest in preventing [consumer] deception.”³⁶ Unlike the

the game’s content is sexually explicit. This is unlike a surgeon general’s warning of the carcinogenic properties of cigarettes.” *Id.* at 652.

³² *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *22 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651(1985)).

³³ *Zauderer*, 471 U.S. at 651 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). However, the 2006 smoking warnings that the Seventh Circuit draws its distinction from are unlike those going into place in 2012—textual, non-controversial, and meant simply to inform the reader about the dangers of using tobacco products.

³⁴ *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *20-26; *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 532 (W.D. Ky. 2010).

³⁵ See *Zauderer*, 471 U.S. at 651; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980); *Entm’t Software Ass’n*, 469 F.3d at 652. An argument could be made that a recent Supreme Court decision, *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), has affected commercial disclosure standards. However, in *Sorrell*, the Court failed to define its heightened level of judicial scrutiny and did not explain why the pharmaceutical information qualified as commercial speech. *Sorrell*, 131 S. Ct. at 2658.

³⁶ *Zauderer*, 471 U.S. at 651.

disclosure of "purely factual and uncontroversial information," disclosures of "subjective and highly controversial" information should require the application of strict scrutiny under *Wooley*.³⁷ When strict scrutiny is required, however, the state must demonstrate that the regulation "is narrowly tailored to achieve a compelling governmental interest."³⁸

If a court determines that the disclosure is neither "purely factual and uncontroversial" nor purely "subjective and highly controversial," the court should instead adopt the *Central Hudson* standard to determine the constitutionality of the regulation.³⁹ *Central Hudson* consists of a four-part test through which the court must determine if the disclosure: (1) concerns a lawful activity and is not misleading; (2) if "the asserted governmental interest is substantial"; (3) "whether the regulation directly advances" the government's asserted interest; and (4) if the regulation is not more extensive than "necessary to serve" the state's interest.⁴⁰ If all factors are positive, the compelled disclosure is constitutional under *Central Hudson*.⁴¹ *Central Hudson* should also apply if a court determines that the warnings require a defendant to limit or suppress an advertisement's message, rather than disclose certain information.⁴²

This Comment's proposal attempts to balance countervailing policy considerations: the free choice of consumers from paternalistic manipulation by the government with the government's interest in ensuring that consumers receive the factual information necessary to make informed decisions. The Supreme Court's high regard for consumer free choice absent governmental manipulation should be given significant deference by using the lowest standard available, the *Zauderer* "reasonable relation" standard on disclosures of "purely factual" information.⁴³

³⁷ *Zauderer*, 471 U.S. at 651; *Entm't Software Ass'n*, 469 F.3d at 652. For an example of the application of strict scrutiny, see *Barnette*, 319 U.S. at 639.

³⁸ *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *27.

³⁹ *Zauderer*, 471 U.S. at 651; *Entm't Software Ass'n*, 469 F.3d at 652. See generally *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

⁴⁰ *Cent. Hudson*, 447 U.S. at 566.

⁴¹ *Id.*

⁴² *Edenfield v. Fane*, 507 U.S. 761, 768-769 (1993).

⁴³ See generally *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

Since the government has an important interest in protecting consumers by “prevent[ing] the dissemination of commercial speech that is false . . . or misleading,” information that is non-factual and subjective should require analysis under the most severe standard: strict scrutiny of *Wooley*.⁴⁴ Likewise, information that is neither purely factual nor subjective should require *Central Hudson* intermediate scrutiny as a balance between the policy consideration of promoting consumer free choice with the government’s interest in ensuring that consumers receive the facts necessary to make informed decisions.

The intricacy of the “subjective and highly controversial,”⁴⁵ “purely factual and uncontroversial,” and neither entirely subjective nor entirely factual categories of commercial disclosure requires representative examples of each classification.⁴⁶ Specifically, in regards to the pictorial warnings, the “purely factual and uncontroversial” disclosure category should apply only to textual statements based entirely in fact, such as “Warning: Second-hand smoking causes approximately 443,000 deaths each year” and “Warning: Smoking can lead to premature aging and obesity.”⁴⁷ The “subjective and highly controversial” category should include the use of any image, since images inherently elicit emotional responses—as proven by researchers world-wide, including scientists at the University of Wisconsin, the Institute of Psychiatry at the University of London, the University of Waterloo in Canada, and the Ontario Institute for Cancer Research—as well as statements which have no factual foundation, such as “Warning: Second-hand smoke will kill your children” and “Warning: Smoking will make you ugly.”⁴⁸ Disclosures that do not

⁴⁴ *Zauderer*, 471 U.S. at 638.

⁴⁵ *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

⁴⁶ *Zauderer*, 471 U.S. at 651.

⁴⁷ *Id.* Note that smoking actually does cause approximately 443,000 deaths each year. *Smoking & Tobacco Use: Fast Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/#toll (last visited May 4, 2012).

⁴⁸ For a medical perspective of the cognitive effects of viewing images, see R. Borland et al., *Impact of Graphic and Text Warnings on Cigarette Packs: Findings from Four Countries over Five Years*, 18 *TOBACCO CONTROL* 358 (2009); Daren C. Jackson et al., *Suppression and Enhancement of Emotional Responses to Unpleasant Pictures*, 37 *PSYCHOPHYSIOLOGY* 515-22 (2000); John D. Teasdale et al., *Functional MRI Study of*

fit neatly into the *Zauderer* or *Wooley* categories should require *Central Hudson* analysis and include the use of images (which alone would require *Wooley*) accompanied by purely factual statements (which alone would require *Zauderer*), as well as statements based in fact, but subjective in application through the use of personal pronouns like "you" and "your," such as "Warning: Second-hand smoke may harm your children" and "Warning: Smoking may cause you to have wrinkles and age spots."⁴⁹

Alone, the images of cadavers, tracheotomy cavities, and crying children are "subjective and highly controversial" and therefore should require application of *Wooley* strict scrutiny.⁵⁰ Most of the textual statements accompanying the warnings—including "WARNING: Cigarettes are addictive" and "WARNING: Cigarettes cause strokes and heart disease"—are "purely factual and uncontroversial," hence requiring application of *Zauderer*.⁵¹ In order to test the entire compelled disclosure, courts should utilize the *Central Hudson* standard since the images with the accompanying textual statements are neither entirely subjective nor factual. Even if the proposed distinctions of when to apply the *Central Hudson*, *Zauderer*, and *Wooley* standards are rejected, Parts II through IV illustrate that the warnings are unconstitutional under every available Supreme Court standard, and thus under any circumstance should be held unconstitutional.

the Cognitive Generation of Affect, 156 AM. J. PSYCHIATRY 209 (1999). See generally *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

⁴⁹ See generally *Zauderer*, 471 U.S. at 651; *Wooley v. Maynard*, 430 U.S. 705 (1977).

⁵⁰ *Entm't Software Ass'n*, 469 F.3d at 652; *Health Warnings*, *supra* note 7. See generally *Wooley*, 430 U.S. at 705.

⁵¹ *Zauderer*, 471 U.S. at 651; *Health Warnings*, *supra* note 7.

II. THE UNCONSTITUTIONALITY OF THE FDA'S WARNINGS UNDER *ZAUDERER*'S "REASONABLE RELATION" STANDARD

A. *First Requirement of Zauderer: The State's Interest is Not to Prevent Consumer Deception*

Even though this Comment's proposed standard requires a *Central Hudson* analysis, the warnings—if analyzed under *Zauderer*—should be deemed unconstitutional. In accordance with *Zauderer*, a compelled disclosure of “purely factual and uncontroversial information” is constitutional if it is “reasonably related to the state's interest in preventing” consumer deception because then the restriction is not “unjustified or unduly burdensome” under the First Amendment.⁵² The warnings must first fail under *Zauderer* because the state's interest is not in preventing consumer deception, either for children or adults, as proven by the FDA's own statements. The FDA's self-professed purpose of the Act is to “help tobacco users quit and prevent young people from starting” by requiring the warnings to “serve as [a] reminder of the negative health consequences of smoking every time someone picks up a pack of cigarettes.”⁵³ It is unlikely from the FDA's statements that their intention is purely to prevent consumer deception.⁵⁴ Even in their selection of the warnings, the FDA cited the “images’ ‘salience’—defined . . . as a warning's ability to evoke emotion—as a primary selection criterion” and used an “emotional reaction scale (e.g., disgusted, worried)” to decide what warnings to choose.⁵⁵ Through their statements, the FDA has made clear that the warnings' purpose is not to prevent deception by providing factual information, but rather to manipulate consumers into not purchasing tobacco products.⁵⁶

⁵² *Zauderer*, 471 U.S. at 651.

⁵³ *Health Warnings*, *supra* note 7.

⁵⁴ *Zauderer*, 471 U.S. at 651.

⁵⁵ *R.J. Reynolds Tobacco Co. v. FDA*, No. 11-1482, 2011 U.S. Dist. LEXIS 128372, at *11 (D.C. Cir. Nov. 7, 2011); JAMES NONNEMAKER ET AL., CTR. FOR TOBACCO PRODS., USA 2010—EXPERIMENTAL STUDY OF GRAPHIC CIGARETTE WARNING LABELS—FINAL RESULTS REPORT AND APPENDICES (2010), available at <http://www.tobaccolabels.ca/health/usa-2010-experimental-study-of-graphic-cigarette-w-7>.

⁵⁶ Consumer manipulation or “neuromarketing” is a thriving international business. See NEUROMARKETING SCIENCE & BUSINESS ASSOCIATION, <http://www.nmsba.com/neuromarketing-science-business-association> (last visited May

The sheer size of the warning labels also undermines the FDA's potential argument that the warnings are intended to prevent consumer deception. The warnings will cover the top fifty percent of the front and rear of cigarette packages, and thirty percent of the front and rear of smokeless tobacco products.⁵⁷ If the government's sole interest is to prevent the deception of consumers, then why would not a larger textual warning be sufficient? Likewise, the mandated surgeon general's warnings illustrating the dangers of smoking arguably already protect consumers from possible tobacco company manipulation and warn consumers about what they already know—smoking kills, is dangerous, and creates serious risks to the smoker's health.⁵⁸ Rather than prevent consumer deception, the FDA's interest, in their own words, is to promote “smokers to quit” and “youth to say no to smoking.”⁵⁹

4, 2012). For general information about the impact of neuromarketing on consumers, see Laurie Burkitt, *Neuromarketing: Companies Use Neuroscience for Consumer Insights*, FORBES (Nov. 16, 2009, 2:00 PM), <http://www.forbes.com/forbes/2009/1116/marketing-hyundai-neurofocus-brain-waves-battle-for-the-brain.html>.

⁵⁷ PR Newswire, *supra* note 5.

⁵⁸ *Vital Signs: Current Cigarette Smoking Among Adults Aged ≥ 18 Years—United States, 2009*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 10, 2010) <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5935a3.htm>. This CDC report found the following:

In 2009, 20.6% of U.S. adults aged ≥ 18 years were current cigarette smokers. Men (23.5%) were more likely than women (17.9%) to be current smokers. The prevalence of smoking was 31.1% among persons below the federal poverty level. For adults aged ≥ 25 years, the prevalence of smoking was 28.5% among persons with less than a high school diploma, compared with 5.6% among those with a graduate degree.

Id. In 2010, the Centers for Disease Control and Prevention estimated that 31.4% of American Indian / Alaska Natives (non-Hispanic) adults in the United States were smokers, 9.2% of Asian American adults were smokers, 29.6% of African American (non-Hispanic) adults were smokers, 12.5% of Hispanic American adults were smokers, and 21.0% of Caucasian American adults were smokers. *Smoking & Tobacco Use: Adult Cigarette Smoking in the United States: Current Estimate*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm (last visited May 4, 2012). The CDC also estimates that “45.3 million people, or 19.3% of all adults (aged 18 years or older), in the United States smoke cigarettes.” *Id.*

⁵⁹ *Health Warnings*, *supra* note 7. Note that the economic impact on the U.S. government of citizens using tobacco products has been debated. For competing views compare Stephanie Saul, *Government Gets Hooked on Tobacco Tax Billions*, N.Y. TIMES, Aug. 30, 2008, available at <http://www.nytimes.com/2008/08/31/weekinreview/31saul.html> (discussing the tobacco industry's multi-billion dollar revenue

*B. Second Requirement of Zauderer: The Warning
Requirement is Not Reasonably Related to the Alleged State
Interest in Preventing Consumer Deception*

Even if the FDA could demonstrate that its interest is to prevent consumer deception, the warnings would still fail under *Zauderer's* requirement that the disclosure be "reasonably related" to the state's interest for two reasons: the images elicit an emotional response rather than inform and other options not restricting commercial speech are available.⁶⁰ Images of cadavers and cancer are not "reasonably related" to the state's interest in preventing consumer deception because, as proven by researchers world-wide, they elicit a purely emotional response rather than provide unbiased information.⁶¹ Even if the FDA were to argue that the warnings are meant to caution an illiterate or non-English speaking audience (an argument they have not made), the warnings would still fail under *Zauderer* because there are other reasonable options available to the FDA, such as bilingual warnings for non-English speaking citizens or a picture of the world-renowned symbol for danger, a skull and crossbones, for illiterate citizens.⁶² Arguably, however, implementing new warnings solely for a bilingual or illiterate audience is also unconstitutional, since the "Constitution . . . requires us to ask whether [the] legislation unduly burdens the First Amendment rights of" all individuals and groups affected by the regulation, not just illiterate or bilingual citizens.⁶³

impact on the state and federal governments), with WORLD HEALTH ORG., ECONOMICS OF TOBACCO TOOLKIT, ASSESSMENT OF THE ECONOMIC COSTS OF SMOKING (2011) (discussing the impact of healthcare costs, indirect morbidity costs, and indirect mortality costs associated with smoking).

⁶⁰ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

⁶¹ See Borland, *supra* note 48; Jackson, *supra* note 48.

⁶² The symbol of skull and crossbones is used by both the United States and the United Nations to symbolize dangerous, toxic, or hazardous material. See, e.g., *Pesticides: International Activities, Skull and Crossbones*, EPA, <http://www.epa.gov/oppead1/international/ghs/skull-crossbones.htm> (last visited May 4, 2012); *Red triangle with skull and crossbones is for danger—new UN radiation symbol*, UN NEWS Serv. (Feb. 15, 2007), <http://www.un.org/apps/news/story.asp?NewsID=21578&Cr=iaea&Cr1=>.

⁶³ *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006) (citation omitted).

If the FDA's concern is that consumers will not see the textual warnings, they could instead enlarge the already mandatory surgeon general warnings or move the warnings from the sides of packages to the front of tobacco packages. Instead, the FDA has chosen to use the pictorial warnings to "serve as a [constant] reminder of the negative health consequences" of using tobacco products.⁶⁴ Other reasonable options discussed in Part V that prevent consumer deception without infringing on First Amendment Rights, such as the use of an educational health campaign, also illustrate the unreasonableness of the proposed warnings.

III. THE UNCONSTITUTIONALITY OF THE FDA'S WARNINGS UNDER WOOLEY'S STRICT SCRUTINY STANDARD

A. First Requirement of Wooley: The Government's Failure to Demonstrate a Compelling State Interest

Wooley applies a strict scrutiny standard whereby the regulation is unconstitutional if it is not "narrowly tailored to achieve a compelling government interest."⁶⁵ The first prong of strict scrutiny, which requires the government to demonstrate "a compelling government interest," is "normally a *perfunctory* step in the strict-scrutiny [commercial speech] analysis."⁶⁶ However, the FDA's commission of an "18,000 consumer study . . . to help determine which of the 36 proposed graphic images it would ultimately select" undermines its argument that it has a compelling state interest.⁶⁷ "[T]he study was *not* designed to assess whether the proposed graphic images would have a statistically significant impact on consumer awareness of smoking risks, but rather to" advocate a change in consumer behavior.⁶⁸ The warning labels were "calculated to provoke the viewer to quit, or never start, smoking: an objective wholly apart from [the

⁶⁴ *Health Warnings*, *supra* note 7.

⁶⁵ *R.J. Reynolds Tobacco Co. v. FDA*, No. 11-1482, 2011 U.S. Dist. LEXIS 128372, at *27 (D.C. Cir. Nov. 7, 2011). See generally *Wooley v. Maynard*, 430 U.S. 705 (1977).

⁶⁶ *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *27.

⁶⁷ *Id.* at *28.

⁶⁸ *Id.* at *28-29.

compelling state interest of] disseminating purely factual and uncontroversial information” to prevent consumer deception.⁶⁹ Attempting to manipulate both adult and adolescent consumer behavior is not a compelling governmental interest; therefore, the new warnings should fail under the first prong of strict scrutiny.⁷⁰

B. Second Requirement of Wooley: The Warning Requirement is Not Narrowly Tailored

Under the second prong of strict scrutiny, the “compelling governmental interest” must be “narrowly-tailored,”⁷¹ meaning “a less restrictive alternative [that] would serve the Government’s purpose” must not be available.⁷² The warnings fail under this prong for three reasons: (1) the size of the warnings; (2) the government’s failure to consider the First Amendment rights of all groups affected by the regulation; and (3) the fact that other reasonable means exist to prevent consumer deception and inform consumers about the dangers of using tobacco products. “[T]he sheer size and display requirements for the graphic images are anything but narrowly tailored.”⁷³ By covering the top fifty percent of both the front and rear panels of cigarette packages, as well as the top thirty percent of the front and rear of smokeless tobacco packages, the government has failed to meet the “narrowly-tailored” prong.⁷⁴ A Seventh Circuit case, *Entertainment Software Association v. Blagojevich*, supports this finding.⁷⁵

In *Blagojevich*, the Seventh Circuit determined that the “State of Illinois . . . [went] too far in its attempt to protect minors from the allegedly dangerous impact of certain video games,” even though—as the Supreme Court explained in *Sable*

⁶⁹ *Id.* at *23 (“[W]here these emotion-provoking images are coupled with text extolling consumers to call the phone number ‘1-800-QUIT[-NOW]’—the line seems quite clear.” (emphasis added)).

⁷⁰ *Id.* at *27-29.

⁷¹ *Id.* at *29.

⁷² *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006) (quoting *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000); *FCC v. Pacifica*, 438 U.S. 726, 751 (1978)).

⁷³ *R.J. Reynolds Tobacco Co. v. FDA*, 2011 U.S. Dist. LEXIS 128372, at *31.

⁷⁴ *Id.*

⁷⁵ *Id.* at *32.

Communications of California, Inc. v. FCC—the state may have “a compelling interest in protecting the physical and psychological well-being of minors.”⁷⁶ In an effort to protect children, the Illinois law required “video game retailers to place a four square-inch label with the numerals ‘18’ on any ‘sexually-explicit’ video game.”⁷⁷ The “four-square-inch sticker ‘literally fail[ed] to be narrowly-tailored’ because it ‘cover[ed] a substantial portion of the box.’”⁷⁸ Similarly, the pictorial tobacco warnings will cover approximately thirty percent of all useful surface area on a typical cigarette package, taking over “a substantial portion”⁷⁹ of tobacco packages as well as “affirmative[ly] limit[ing]” tobacco manufacturers’ ability to speak.⁸⁰

In addition to failing under the narrowly tailored prong because of the size of the warnings, the warnings also fail because the Constitution requires more than just looking at whether one particular group “will be affected by the challenged legislation.”⁸¹ Instead, the court must examine how the legislation will affect all groups that “have First Amendment rights.”⁸² Therefore, even if the FDA can successfully argue that the warnings protect

⁷⁶ *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989); *Entm't Software Ass'n*, 469 F.3d at 643.

⁷⁷ *Entm't Software Ass'n*, 469 F.3d at 643.

⁷⁸ *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *32 (citing *Entm't Software Ass'n*, 469 F.3d at 652) (“The State has failed to even explain why a smaller sticker would not suffice. Certainly we would not condone a health department’s requirement that half of the space on a restaurant menu be consumed by the raw shellfish warning. Nor will we condone the State’s unjustified requirement of the four square-inch ‘18’ sticker.”).

⁷⁹ *Id.*

⁸⁰ *Disc. Tobacco City & Lottery v. United States*, Nos. 10-5234/10-5235, 2012 U.S. App. LEXIS 5614, at *27-28 (6th Cir. Mar. 19, 2012). According to the author’s limited mathematical skills, the surface area of a regular Marlboro cigarette package of twenty Class A cigarettes is as follows (in centimeters): 2 (8.2 cm {front panel height} x 5.6 cm {front panel width}) + 2 (2.3 cm {top panel height} x 5.6 cm {top panel width}) + 2 (8.2 cm {side panel height} x 2.3 cm {side panel width}). This calculates as follows: 91.84 cm² (combined surface area of front and rear panels) + 25.76 cm² (combined surface area of top and bottom panels) + 37.72 cm² (combined surface area of both side panels), equaling a total surface area of approximately 155.32 cm². The FDA’s warnings, requiring fifty percent surface area on the front and rear panels, amount to 0.50 x 91.84 cm², totaling 45.92 cm² total in graphic warnings. This illustrates that the warning labels alone will take up approximately 30% [(45.92 cm² / 155.32 cm²) x 100] of all useful advertising space on a typical tobacco package.

⁸¹ *Entm't Software Ass'n*, 469 F.3d at 646.

⁸² *Id.* (citation omitted).

children, the warnings would again fail because a compelling governmental interest in protecting one group of citizens is not enough to constitutionally validate the regulation. Furthermore, the warnings are not narrowly tailored because there are other "reasonable means of disseminating accurate information."⁸³ A reasonable option for the government to prevent consumer deception would be to publish a graph that depicts the types of health ailments that befall people who use tobacco products.⁸⁴ The state could also prevent consumer deception while educating consumers about the dangers of tobacco products through the use of a "broader educational campaign."⁸⁵ In conclusion, the government cannot meet either prong of strict scrutiny: (1) a compelling governmental interest that is (2) narrowly tailored.⁸⁶

C. The Unconstitutionality of Using Tobacco Packages as Billboards and Other Narrowly Tailored Means Available

The warnings infringe upon the First Amendment rights of both consumers and tobacco manufacturers by requiring—as the FDA commissioner stated—that "every single pack of cigarettes in our country" serve as a "mini-billboard."⁸⁷ Through the warnings, the FDA has violated the choice to not speak, a First Amendment right recognized by the Supreme Court in such cases as *West Virginia v. Barnette* and *Wooley v. Maynard*.⁸⁸ In *Wooley*, the Court considered whether the state's interest was "sufficiently compelling to justify requiring appellees [drivers of the Jehovah's

⁸³ *R.J. Reynolds Tobacco Co. v. FDA*, 2011 U.S. Dist. LEXIS 128372, at *33.

⁸⁴ *Id.* at *33-34.

⁸⁵ *Entm't Software Ass'n*, 469 F.3d at 652.

⁸⁶ The court in *R.J. Reynolds* found that "the Government has neither carried its burden of demonstrating a compelling interest, nor demonstrated how the Rule is narrowly tailored to achieve a constitutionally permissible form of compelled commercial speech." *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *35.

⁸⁷ *Id.* at *31 (citation omitted). In *Wooley*, Justice Rehnquist, with whom Justice Blackmun joined in dissent, argued that "[f]or First Amendment principles to be implicated, the State must place the citizen in the position of either apparently to, or actually 'asserting as true' the message." *Wooley v. Maynard*, 430 U.S. 705, 721 (1977). Even if the dissent is correct in this regard, they failed to take into account that even when the government has a purpose that is both "legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 716. Therefore, the FDA's requirements still must fail because the ends "can be more narrowly achieved." *Id.*

⁸⁸ *Id.* at 705; *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

Witness faith] to display the state motto ("Live Free or Die") on their [vehicle] license plates."⁸⁹ The issue was whether New Hampshire could "constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."⁹⁰ The Court found that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such a message."⁹¹ New Hampshire had essentially forced the drivers to "use their private property as a 'mobile billboard' for the State's ideological message—or suffer a penalty."⁹²

In the present situation, tobacco companies are forced to print and citizens are forced to carry the government's "ideological message" (e.g., "tobacco use has horrific consequences too gruesome to comprehend without images").⁹³ Under *Wooley*, such a limitation on "fundamental personal liberties" is unconstitutional.⁹⁴ Neither tobacco manufacturers nor consumers can be forced to carry the ideological message of the state, and *Wooley* illustrates that forcing tobacco companies and consumers to do so is an unreasonable restraint on personal liberties guaranteed by the First Amendment.⁹⁵

⁸⁹ *Wooley*, 430 U.S. at 716.

⁹⁰ *Id.* at 713.

⁹¹ *Id.* at 717.

⁹² *Id.* at 715.

⁹³ Although the Court in *Wooley* declined to define what it considers to be "ideological," Merriam-Webster defines the term as "the integrated assertions, theories and aims that constitute a sociopolitical program." *Ideology Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/ideology?show=0&t=1319734417> (last visited May 4, 2012).

⁹⁴ *Wooley*, 430 U.S. at 716.

⁹⁵ *Id.* at 715-17.

IV. THE UNCONSTITUTIONALITY OF THE FDA'S WARNINGS
UNDER *CENTRAL HUDSON*'S INTERMEDIATE SCRUTINY
STANDARD

In accordance with this Comment's standard, the warnings together with their accompanying textual messages should be evaluated under *Central Hudson* since the entire disclosure is neither "purely factual and uncontroversial" (requiring *Zauderer* analysis) nor "subjective and highly controversial" (requiring *Wooley* analysis).⁹⁶ *Central Hudson* should also apply when evaluating the constitutionality of commercial speech suppression: its traditional use in commercial speech doctrine.⁹⁷ Due to the size of the warnings, the labels amount to a commercial speech suppression in addition to a compelled disclosure, since the "warnings . . . 'confiscate' the front and back portions of [all] cigarette packag[es]."⁹⁸ Application of the *Central Hudson* standard illustrates, however, that regardless of whether the regulation is considered to be a disclosure or suppression, the warnings must be considered unconstitutional. In accordance with *Central Hudson*, for a commercial speech regulation to be constitutional, it must survive a four-part test of which the government bears the burden.⁹⁹ The court must first determine if the regulation (1) concerns a lawful activity and is not misleading, and then (2) if "the asserted governmental interest is substantial."¹⁰⁰ If both of the previous factors are positive, then the court must (3) "determine whether the regulation directly advances" the government's asserted interest, and (4) if it is more extensive than "necessary to serve" the government's interest.¹⁰¹ Under the third prong, the government must prove by more than "mere speculation or conjecture . . . that the harms it recites are

⁹⁶ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

⁹⁷ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557 (1980); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 508 (1996); *Edenfield v. Fane*, 507 U.S. 761, 768-769 (1993).

⁹⁸ *R.J. Reynolds*, 2011 U.S. Dist. LEXIS 128372, at *17; see, e.g., *Entm't Software Ass'n*, 469 F.3d at 641.

⁹⁹ *Cent. Hudson*, 447 U.S. at 566.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

real and that its restriction will in fact alleviate them to a material degree.”¹⁰²

Although the regulation does not have to be the “least-restrictive-means” available of achieving the governmental interest, there must be a “reasonable fit” between the regulation and the state interest.¹⁰³ A paternalistic assumption by the state that consumers will harm themselves by using “truthful, nonmisleading . . . information unwisely” cannot be the basis for the regulation.¹⁰⁴

A. The Second Prong of Central Hudson: The Government’s Failure to Demonstrate a Substantial State Interest

Under the first prong of *Central Hudson*, the regulation easily falls within the First Amendment’s scope because it “concern[s] lawful activity and [is] not . . . misleading.”¹⁰⁵ The government, however, cannot demonstrate that its interest in manipulating “the viewer to quit, or never to start, smoking” is substantial in order to fulfill the second prong of *Central Hudson*.¹⁰⁶ Even if the government were to argue that its interest is in “preventing underage tobacco use”—an interest recognized as “substantial, and even compelling” by the Supreme Court—a regulation must not unduly burden the rights of all people affected by it.¹⁰⁷ In addition, the FDA requirements clearly violate

¹⁰² *Edenfield*, 507 U.S. at 770-71.

¹⁰³ *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989); *Cent. Hudson*, 447 U.S. at 566.

¹⁰⁴ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 497 (1996).

¹⁰⁵ *Cent. Hudson*, 447 U.S. at 566.

¹⁰⁶ *Id.*; see also *R.J. Reynolds Tobacco Co. v. FDA*, No. 11-1482, 2011 U.S. Dist. LEXIS 128372, at *23 (D.C. Cir. Nov. 7, 2011). The government may also seek to counteract manipulation by tobacco companies since historically tobacco companies have not been innocent bystanders in consumer manipulation. From the Marlboro Man to Joe Camel, tobacco companies are not known for their honesty in advertising. For example, from the 1920s to the 1950s, tobacco companies ran advertisements featuring doctors, dentists, Mickey Mantle, and even Santa Clause endorsing cigarettes. Stuart Elliot, *When Doctors, and Even Santa, Endorsed Tobacco*, N.Y. TIMES, Oct. 7, 2008, at B3, available at <http://www.nytimes.com/2008/10/07/business/media/07adco.html?partner=permalink&exprod=permalink>; *In Old Ads, Doctors and Babies Say “Smoke,”* N.Y. TIMES, http://www.nytimes.com/slideshow/2008/10/06/business/media/20081006_CigaretteAd_Slideshow_ready_index.html (last visited May 4, 2012).

¹⁰⁷ *Disc. Tobacco City & Lottery v. United States*, Nos. 10-5234/10-5235, 2012 U.S. App. LEXIS 5614, at *8 (6th Cir. Mar. 19, 2012) (citing *Lorillard Tobacco v. Reilly*, 533

commercial free speech guaranteed by the First Amendment because the regulation fails to "directly advance" the state interest under the third prong and is "more extensive than necessary" under the fourth prong of the *Central Hudson* analysis.¹⁰⁸

B. The Third Prong of Central Hudson: The Warning Requirement Fails to Directly Advance the State's Interest

The regulation fails under the third prong of *Central Hudson* because the governmental interest is not "directly advance[d]." ¹⁰⁹ The Court has consistently rejected the idea of creating a "vice exception" to the application of the *Central Hudson* test, and *44 Liquormart, Inc. v. Rhode Island* illustrates how regulations that attempt to deter people from what the government views as an unhealthy vice consistently fail to advance the government's interest "to a material degree." ¹¹⁰ In *44 Liquormart*, the Court found a ban on showing the prices of alcohol in advertisements to be unconstitutional since "evidence suggest[ed] that the abusive drinker . . . [would] probably not be deterred by a marginal price increase, and that the true alcoholic . . . [might] simply reduce his purchases of other necessities" to feed his habit.¹¹¹ In its determination, the Court relied on the fact that the state had failed to offer any evidence "to suggest that its speech prohibition

U.S. 525, 564 (2001)); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006).

¹⁰⁸ Arguably the warnings might fail under the state interest prong of *Central Hudson* since members of the Supreme Court have distinguished between broad and narrow interpretations of a state's interest. In *Emp't Div. v. Smith*, 494 U.S. 872 (1990), which concerned Native American ceremonial use of peyote, Justice Blackmun, Justice Brennan, and Justice Marshall—as the dissent—distinguished levels of a state's interest and stated that the government's interest should not be broadly defined as "fighting the critical war on drugs," but rather as a narrow interest "in refusing to make an exception for the religious, ceremonial use of peyote." *Id.* at 910 (internal quotation marks omitted). In the present situation, the broad governmental interest would be to prevent consumer deception, while the narrow interest would be the refusal to accept consumer free-choice to use tobacco products despite awareness of the health risks.

¹⁰⁹ *Cent. Hudson*, 447 U.S. at 566.

¹¹⁰ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478 (1995).

¹¹¹ *44 Liquormart*, 517 U.S. at 506.

[would] *significantly* reduce marketwide consumption.”¹¹² The FDA’s commercial speech regulation on tobacco companies has the same enervations as Rhode Island did in *44 Liquormart*, since the FDA has not proven that the regulation “will *significantly* reduce marketwide consumption.”¹¹³ Therefore, the government has failed to meet the third prong of *Central Hudson* by failing to prove that the regulation will advance the state’s interest to a direct and material degree.¹¹⁴

C. Fourth Prong of Central Hudson: The Warning Requirement is More Extensive than Necessary to Serve the State’s Interest

The regulations also fail under the fourth prong of *Central Hudson* and hence are unconstitutional since they are “more extensive than . . . necessary to serve” the government’s interest.¹¹⁵ “A speech regulation cannot unduly impinge the speaker’s ability to propose a commercial transaction and the adult listener’s opportunity to obtain information about products.”¹¹⁶ In *44 Liquormart*, the Supreme Court refused to uphold a commercial speech regulation because “alternative forms of regulation . . . would not involve any commercial speech restriction . . . [such as] increased taxation . . . [and] the use of educational campaigns.”¹¹⁷ One example of a reasonable option that would not infringe upon commercial speech rights would be for the government to publish charts and graphs depicting the increased risk of diseases and health ailments in people who use

¹¹² *Id.*

¹¹³ *Id.* The FDA “could ‘not reject, in a statistical sense, the possibility that the rule will not change the U.S. smoking rate,’ it also could not reject the possibility that the rule would lead to significant reductions in tobacco use and thus savings to the American public.” Memorandum of Amici Curiae American Academy of Pediatrics et al. at 20, *R.J. Reynolds Tobacco Co. v. FDA*, No. 11-1482, 2012 WL 664010 (D.C. Cir. Feb. 29, 2012); see also E.J. Strahan, *Enhancing the Effectiveness of Tobacco Package Warning Labels: A Social Psychological Perspective*, 11 TOBACCO CONTROL 183 (Mar. 1, 2002), available at <http://tobaccocontrol.bmj.com/content/11/3/183.short> (discussing the potential for the warnings to influence consumer tobacco habits).

¹¹⁴ *Cent. Hudson*, 447 U.S. at 566.

¹¹⁵ *Id.*

¹¹⁶ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 529 (2001).

¹¹⁷ *44 Liquormart*, 517 U.S. at 486.

tobacco products.¹¹⁸ As discussed in Part V, the government also has many other reasonable options available to promote smoking cessation without infringing on the First Amendment rights of tobacco companies or consumers, such as the taxation of tobacco products or the banning of tobacco use in public places.

V. AVAILABLE OPTIONS TO PREVENT CONSUMER DECEPTION

A. Taxation of Tobacco Products

Under Article I, Section 8 of the U.S. Constitution, Congress has the power “to lay and collect taxes” upon corporations, while states have the power to tax out-of-state corporate entities as long as a sufficient nexus exists between the business and the state.¹¹⁹ With the power to tax, of course, comes the inherent authority to increase taxes. By lobbying for increased federal taxes on tobacco products (or encouraging states to tax tobacco products at a higher rate), the FDA would promote their purpose of dissuading non-smokers, especially children, from starting to smoke while encouraging current smokers to quit. “Sin taxes,” such as taxes on tobacco and alcohol, have been widely endorsed as a critical tool in decreasing tobacco use by renowned anti-smoking organizations such as the World Health Organization, the Campaign for Tobacco-Free Kids, the Centers for Disease Control and Prevention, and the Office of the Surgeon General.¹²⁰ The Centers

¹¹⁸ *R.J. Reynolds Tobacco Co. v. FDA*, No. 11-1482, 2011 U.S. Dist. LEXIS 128372, at *33-34 (D.C. Cir. Nov. 7, 2011).

¹¹⁹ *Quill Corp. v. North Dakota*, 504 U.S. 298, 304 (1992). “The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imports and Excises shall be uniform throughout the United States.” U.S. CONST. art. I, §8.

¹²⁰ DISEASE CONTROL PRIORITIES PROJECT, TAX AND SPEND FOR BETTER HEALTH: OFTEN OVERLOOKED, FISCAL POLICIES ARE POWERFUL TOOLS (2009), <http://www.dcp2.org/file/241/dcpp-fiscalpolicies-web.pdf>; see, e.g., ANN BOONN, CAMPAIGN FOR TOBACCO-FREE KIDS, RAISING CIGARETTE TAXES REDUCES SMOKING, ESPECIALLY AMONG KIDS (AND THE TOBACCO COMPANIES KNOW IT) (Aug. 26, 2011), http://www.vctc.org.au/downloads/CTFK_RaisingCigTaxes.pdf; *Smoking & Tobacco Use: Smoke-Free Policies Reduce Smoking*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/protection/reduce_smoking/index.htm#studies (last visited May 21, 2011); U.S. DEP’T OF HEALTH AND HUMAN SERVS., HOW TOBACCO SMOKE CAUSES DISEASE, THE

for Disease Control and Prevention estimated that alone “a 10% increase in price . . . [would] reduce overall cigarette consumption among adolescents and young adults by about 4%.”¹²¹ Although it is arguable that severe addicts, just as the Court in *44 Liquormart* discussed, would not be affected by a “marginal price increase” on tobacco products and instead choose to forego necessities to feed their habit, this method of regulating tobacco products is a viable alternative to infringing upon the First Amendment rights of both consumers and tobacco manufacturers.¹²² The Supreme Court has recognized that “the maintenance of higher prices either [b]y direct regulation or by increased taxation . . . would be more likely to . . . promot[e] temperance” of what are considered to be vice activities.¹²³ More than 315 billion cigarettes and approximately 121.4 million pounds of smokeless tobacco were purchased in the United States in 2009, which generated approximately 17 billion dollars in state and local revenue.¹²⁴ Besides discouraging tobacco use, taxation would benefit states and the federal government by the generation of much needed income for government coffers.¹²⁵

B. Banning of Tobacco Products

No court in the United States has ever found that smokers have a privacy right or a substantive due process right under the Fifth or Fourteenth Amendments to smoke.¹²⁶ Rather, cities in

BIOLOGY AND BEHAVIORAL BASIS FOR SMOKING-ATTRIBUTABLE DISEASE 647 (2010), available at http://www.surgeongeneral.gov/library/reports/tobaccosmoke/full_report.pdf; Brian Tumulty, *Tobacco tax increase expected to reduce smoking*, USA TODAY, Mar. 27, 2009, http://www.usatoday.com/news/health/2009-03-27-tobacco-tax_N.htm.

¹²¹ *Smoking & Tobacco Use: Economic Facts About U.S. Tobacco Production and Use*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 21, 2011), http://www.cdc.gov/tobacco/data_statistics/fact_sheets/economics/econ_facts/index.htm.

¹²² *44 Liquormart*, 517 U.S. at 506.

¹²³ *Id.* at 486.

¹²⁴ *Tax Facts: Tobacco Tax Revenue*, TAX POLICY CTR. (Dec. 5, 2011), <http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=403>; see also Saul, *supra* note 59; *Smoking & Tobacco Use*, *supra* note 121.

¹²⁵ See *Tax Facts: Cigarette Rates 2001-2011*, TAX POLICY CTR. (Apr. 1, 2011), <http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=433>, which gives a state-by-state analysis of tax charges per cigarette package.

¹²⁶ For further information about the limits of personal smoking liberties, see SAMANTHA K. GRAFF, TOBACCO CONTROL LEGAL CONSORTIUM, THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE: 2008 (Mar. 2008), available at

many states including Maine, Texas, Oregon, New York, and Michigan, have already enacted laws banning smoking in places such as work offices, in public, at restaurants, and in public housing.¹²⁷ In an effort to curb smoking, the federal government could encourage municipalities and states to ban tobacco use in public places. For example, in New York City, citizens who get caught smoking “in a park, on [a] beach, in [a] pedestrian mall or a sports stadium” are subject to a fifty dollar fine.¹²⁸ In addition, encouraging smokers to quit by banning smoking in public places has been proven effective overseas. In 2008, a London ban on smoking in public places encouraged over 400,000 London smokers to quit.¹²⁹ Even the Campaign for Tobacco Free Kids recognizes the powerful implications of local and nationwide bans on public smoking and has stated that smoke-free laws “[p]rompt more smokers to try to quit; . . . [i]ncrease the number of successful quit attempts”; and “[d]iscourage kids from ever starting to smoke.”¹³⁰ Smoke-free laws are but one of many options in the government’s fight against tobacco use. This option, however, requires the government to consider the economic implications of

http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-constitution-2008_0.pdf. For an interesting article about the balance between personal constitutional liberties and government interest in protecting public health, see Michele L. Tyler, *Blowing Smoke: Do Smokers Have A Right? Limiting The Privacy Rights Of Cigarette Smokers*, 86 GEO. L.J. 783 (1998).

¹²⁷ Katharine Q. Seelye, *Increasingly, Smoking Indoors Is Forbidden at Public Housing*, N.Y. TIMES, Dec. 18, 2011, at A25, available at http://www.nytimes.com/2011/12/18/us/public-housing-authorities-increasingly-ban-indoor-smoking.html?page=1&_r=1; Report: *Ban Smoking in Public Places—Surgeon General says 126 Million Nonsmokers Exposed to Tobacco Hazards*, MSNBC (June 26, 2006, 4:11 PM), <http://www.msnbc.msn.com/id/13569976/ns/health-addictions/t/report-ban-smoking-public-places/#.TzMPo4HfUrU>.

¹²⁸ Maria Diamond, *NYC Taking ‘Inform On Your Friends’ Approach To Outdoor Smoking Ban, If You Light Up You Better Look Around, But Not For A Cop*, CBS NEWS (May 23, 2011, 9:16 PM), <http://newyork.cbslocal.com/2011/05/23/nyc-smokers-now-prohibited-from-lighting-up-in-many-public-places/>.

¹²⁹ *Smoking Bans Spurs 400,000 People to Quit the Habit*, DAILY MAIL REP. (July 4, 2008, 4:23 PM), <http://www.dailymail.co.uk/health/article-1030575/Smoking-ban-spurs-400-000-people-quit-habit.html>.

¹³⁰ CAMPAIGN FOR TOBACCO-FREE KIDS, SMOKE-FREE LAWS ENCOURAGE SMOKERS TO QUIT AND DISCOURAGE YOUTH FROM STARTING (Dec. 2010), <http://www.tobaccofreekids.org/research/factsheets/pdf/0198.pdf>. For an article opposing smoking bans, see Thomas A. Lambert, *The Case Against Smoking Bans*, REG. (Winter 2006-2007), available at <http://www.cato.org/pubs/regulation/regv29n4/v29n4-4.pdf>.

banning tobacco products, since tobacco product sales generate billions in revenue annually for states and the federal government. The banning of tobacco products would, however, save the U.S. government lost productivity and health care expenditures related to tobacco use, which amount to approximately 193 billion dollars annually.¹³¹

C. Use of Removable Package Inserts

Canada and Australia, as well as other countries, already use removable warning stickers on tobacco packages and removable cards inside tobacco packages to warn consumers about the dangers of using tobacco products.¹³² By placing removable warnings inside or on tobacco packages, Canada has avoided the problem of *Wooley v. Maynard*, where Rhode Island made consumers act as private billboards for the state's ideological message.¹³³ Under this method, however, the FDA would still have to constitutionally validate the use of graphic images in accordance with Supreme Court precedent.

D. Consumer Health and Wellness Educational Programs

Just as in *Entertainment Software Association v. Blagojevich*, "the [FDA] has not demonstrated that it could not accomplish . . . [its] goal with a broader educational campaign."¹³⁴ If the goal is—as the FDA claims it is—to educate consumers about the dangers of smoking and to deter young adults from beginning to smoke, then the government could use health campaigns similar to the "Truth" or "D.A.R.E." programs to educate consumers.¹³⁵ The

¹³¹ *Fast Facts: Smoking & Tobacco Use*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/#toll (last visited May 4, 2012).

¹³² See *Canada*, TOBACCO LABELING RES. CTR., <http://www.tobaccolabels.ca/current/canada> (last visited May 4, 2012); *Marketing of Tobacco in the Age of Advertising Bans*, TOBACCO IN AUSTRALIA, <http://www.tobaccoinaustralia.org.au/chapter-11-advertising/11-6-marketing-of-tobacco-in-the-age-of-advertisin> (last visited May 4, 2012).

¹³³ See *Wooley v. Maynard*, 430 U.S. 705, 716 (1977).

¹³⁴ *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

¹³⁵ See TRUTH, <http://www.thetruth.com> (last visited May 4, 2012); D.A.R.E., <http://dare.com/home/default.asp> (last visited May 4, 2012); FOUNDATION FOR A SMOKEFREE AMERICA, <http://www.anti-smoking.org> (last visited May 4, 2012); and CAMPAIGN FOR TOBACCO-FREE KIDS, <http://tobaccofreekids.org> (last visited May 4,

power of anti-tobacco educational campaigns has already been endorsed by many well-respected smoking cessation advocates. For example, according to the Campaign for Tobacco-Free Kids, “[p]ublic education campaigns are a vital component of a comprehensive tobacco use prevention and cessation program.”¹³⁶ In addition, the Centers for Disease Control and Prevention concluded “that public education . . . campaigns are an integral part of efforts to . . . encourage tobacco cessation,” while the National Cancer Institute has found “that anti-tobacco media campaigns are effective in reducing smoking among youth and adults.”¹³⁷

E. Raising the Penalties for Adolescent Tobacco Sales

The Supreme Court has recognized that “[t]he governmental interest in preventing underage tobacco use is substantial, and even compelling.”¹³⁸ The government may not, however, unduly burden the rights of others affected by the regulation solely on the basis of a “substantial, and even compelling” interest.¹³⁹ Even though the FDA’s own statements illustrate that its interest is in manipulating consumers not to smoke, rather than to discourage adolescent tobacco use, preventing the sale of tobacco to underage individuals should be considered when evaluating how the FDA may be able to effectively regulate tobacco.¹⁴⁰ One way for the FDA to limit underage tobacco use would be for the FDA to encourage stricter federal and state statutory penalties for the sale of tobacco to underage individuals, as endorsed by the

2012), for just four out of multiple examples of current anti-smoking campaigns across the United States.

¹³⁶ *Public Education Campaigns: Overview*, CAMPAIGN FOR TOBACCO-FREE KIDS, http://tobaccofreecenter.org/resources/public_education (last visited May 4, 2012).

¹³⁷ MEG RIORDAN, CAMPAIGN FOR TOBACCO-FREE KIDS, PUBLIC EDUCATION CAMPAIGNS REDUCE TOBACCO USE (Feb. 18, 2011), <http://www.tobaccofreekids.org/research/factsheets/pdf/0051.pdf> (footnote omitted); see also CTRS. FOR DISEASE CONTROL & PREVENTION, BEST PRACTICES FOR COMPREHENSIVE TOBACCO CONTROL PROGRAMS (Oct. 2007), http://www.cdc.gov/tobacco/stateandcommunity/best_practices/pdfs/2007/BestPractices_Complete.pdf; NAT’L. CANCER INST., THE ROLE OF THE MEDIA IN PROMOTING AND REDUCING TOBACCO USE (June 2008), http://cancercontrol.cancer.gov/tcrb/monographs/19/m19_complete.pdf.

¹³⁸ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 528 (2001).

¹³⁹ *Id.*; *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006).

¹⁴⁰ *Health Warnings*, *supra* note 7.

American Lung Association, Campaign for Tobacco Free Kids, and American Cancer Society.¹⁴¹ As the Campaign for Tobacco-Free Kids stated, “strong enforcement of youth access laws [has] substantially reduced illegal sales to minors” in many states already, including California and Massachusetts.¹⁴²

CONCLUSION

Under any Supreme Court standard for evaluating the constitutionality of commercial compelled disclosure or commercial speech suppression, the warnings imposed by the FDA violate the First Amendment. The new warnings fail under: the “reasonable relation” standard of *Zauderer*, the strict scrutiny standard of *Wooley*, and the intermediate scrutiny test of *Central Hudson*. Rather than tax tobacco products, ban tobacco products, use removable warnings, or implement educational campaigns, the FDA has instead chosen to paternalistically manipulate consumers and infringe upon the First Amendment rights of tobacco manufacturers. Although this Comment addresses the First Amendment free speech arguments available to tobacco manufacturers, it does not address other possible constitutional issues like takings clause or property rights claims.¹⁴³ The gravity

¹⁴¹ *Report Shows State & Federal Gov'ts Not Doing Enough to Stop Cigarette Sales to Children—FDA Oversight of Tobacco Needed*, CAMPAIGN FOR TOBACCO-FREE KIDS (Dec. 7, 2001), http://www.tobaccofreekids.org/press_releases/post/id_0424; JESSICA GUILFOYLE, CAMPAIGN FOR TOBACCO-FREE KIDS, PENALIZING KIDS FOR BUYING, POSSESSING, OR SMOKING CIGARETTES, <http://www.tobaccofreekids.org/research/factsheets/pdf/0074.pdf> (last visited May 4, 2012).

¹⁴² JESSICA GUILFOYLE, CAMPAIGN FOR TOBACCO-FREE KIDS, ENFORCING LAWS PROHIBITING CIGARETTE SALES TO KIDS REDUCES YOUTH SMOKING (Nov. 11, 2010), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0049.pdf>.

¹⁴³ For information on possible tobacco company Takings Clause claims, see TOBACCO CONTROL LEGAL CONSORTIUM, TOBACCO CONTROL AND THE TAKINGS CLAUSE (Sept. 2011), available at http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-tobacco-takingsclause-2011_0.pdf (discussing tobacco control and Takings Clause implications) and U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” (emphasis added)).

of the possible implications of the FDA's warning requirement is severe. Vices, sins, and guilty pleasures will be subject to regulation for as long as the government attempts to balance its interest in protecting consumers with fundamental free liberties. We should, however, ask ourselves if our democracy should be permitted to undergo a metamorphosis in the coming years from a nation where facts inform, but consumers have free will, to a society where images manipulate and consumers feel guilty every time they decide to light a cigarette, drink alcohol, or engage in an activity disapproved of by public health officials.

*Stephanie Jordan Bennett**

* Stephanie received her Bachelor of Arts in English and International Studies from Emory University in 2010. She is a May 2013 Juris Doctor candidate at the University of Mississippi School of Law and is currently a staff editor on the *Mississippi Law Journal*. She would like to thank Professor Jack Wade Nowlin, without whom this Comment would not be possible, for his constitutional law insight into the often-confusing and misapplied doctrine of commercial speech. She also gives special thanks to Professor Christopher R. Green for his time, advice, and support, as well as Professor George Cochran whose adverse and challenging arguments strengthened her Comment. Finally, she would like to thank Kristen Kyle who informed her about the international use of removable package inserts in cigarette packages. Although she finds the FDA's warnings to be unconstitutional, Stephanie is a life-long and avid non-smoker. She dedicates this Comment in memory of her father, Stephen Upthegrove Bennett, who fundamentally believed in the heart of this nation, the Constitution of the United States.

AVOIDING ANNIHILATION: WHY TRIAL JUDGES SHOULD REFUSE TO CERTIFY A FACTA CLASS ACTION FOR STATUTORY DAMAGES WHERE THE RECOVERY WOULD LIKELY LEAVE THE DEFENDANT FACING IMMINENT INSOLVENCY

INTRODUCTION.....	1942
I. RAMIFICATIONS OF AGGREGATING STATUTORY DAMAGES.....	1945
<i>A. Distortion of Congressional Intent and the Purpose of Rule 23</i>	<i>1945</i>
<i>B. Aggregated Statutory Damages and the Due Process Clause.....</i>	<i>1947</i>
<i>C. Blackmail Settlements.....</i>	<i>1950</i>
II. BACKGROUND.....	1952
<i>A. The Origins of the Annihilative Argument— Ratner v. Chemical Bank New York Trust Co.....</i>	<i>1952</i>
<i>B. Circuit Courts Ruling on the Issue of Annihilation at the Certification Stage</i>	<i>1955</i>
1. Circuit Court Opinions Recognizing the Effect of Potential Liability as a Superiority Factor	1955
2. Circuit Courts Ruling that Consideration of the Size of a Potential Damages Award at the Certification Stage is Improper.....	1957
3. The Second Circuit: It Could Go Either Way.....	1958
<i>C. District Court Treatment of Aggregated Statutory Damages Claimed Under FACTA</i>	<i>1959</i>
1. District Court Opinions from the Eleventh Circuit	1959
2. District Court Opinion From the Seventh Circuit	1961
<i>D. Legislative Caps of Aggregated Statutory Damages in Other Consumer Protection Acts</i>	<i>1961</i>
III. THE ANNIHILATIVE DAMAGES STANDARD PROVIDES THE BEST SOLUTION WHEN JUDGES ARE FACED WITH THE EXTREME CIRCUMSTANCES CREATED BY AGGREGATING STATUTORY DAMAGES IN A FACTA CLASS ACTION.....	1963

<i>A. Defining the Annihilative Standard</i>	1963
<i>B. Solving the Problems Posed by Annihilative Statutory</i> <i>Damages</i>	1966
1. Staying True to the Purpose of Rule 23 and Congressional Intent.....	1966
2. Avoiding the Due Process Issue.....	1968
<i>a. Massively Aggregated Statutory Awards</i> <i>Certainly Will Be Found Unconstitutional</i>	1969
<i>b. Making Class Certification Rulings in Light</i> <i>of the Constitutional Avoidance Doctrine</i>	1973
<i>c. Settlement Pressure Dooms the "Wait-and-See"</i> <i>Approach</i>	1975
<i>d. Judicial Remittitur Below the Per-Consumer</i> <i>Statutory Minimum Violates the Language of</i> <i>the Statute</i>	1975
3. Preempting Settlement Pressure.....	1976
4. Consideration of the Size of Potential Liability Does Not Constitute a Decision on the Merits in Violation of <i>Eisen v. Carlisle & Jacquelin</i>	1976
<i>C. Policy of Preventing Annihilation</i>	1978
<i>D. FACTA Enforcement Does Not Require Annihilative</i> <i>Damages</i>	1983
CONCLUSION	1985

INTRODUCTION

Is a class action truly the superior method of adjudicating a claim when the suit will impose annihilative liability on a defendant, leaving the defendant teetering on the edge of bankruptcy? What if that defendant's actions were basically harmless? In *Leysoto v. Mama Mia I., Inc.*, the defendant, a locally-owned restaurant, faced such a possibility.¹ In *Leysoto*, the proposed class of approximately 46,000 members sought statutory damages between \$100 and \$1000 per consumer under the Fair and Accurate Credit Transactions Act (FACTA).² The plaintiffs brought suit for Mama Mia's failure to comply with FACTA's truncation requirements by printing more than the last five digits

¹ 255 F.R.D. 693 (S.D. Fla. 2009).

² *Id.* at 694.

of consumers' credit or debit card numbers on their receipts.³ They offered no evidence of any economic harm experienced as a result of the violation. Therefore, if the class were certified, it would expose Mama Mia, a company with a net worth of approximately \$40,000, to liability of \$4.6 to \$46 million in damages for no actual harm.⁴

District court judges across the United States have exercised the considerable discretion implicit in Federal Rule of Civil Procedure 23(b)(3) to deny class certification of claims for minimum statutory damages. These judges have ruled that a class action is not the superior method of adjudication when the proposed class recovery is (1) "potentially annihilatory" to the defendant and (2) disproportionate to plaintiffs' (lack of) actual economic injury.⁵ District and circuit courts that have addressed this issue, however, are divided "as to whether and under what circumstances class action status . . . should be denied as not superior because of the potential for enormous damages . . . for a huge class."⁶

Combining a statutory scheme such as FACTA, which imposes minimum statutory damages per-consumer, and the class action mechanism raises three specific concerns. First, large-scale aggregation of statutory damages "potentially distorts" the intent and purpose behind the statutory damages provision and Rule

³ *Id.* (Plaintiff Leysoto claimed that after paying for a meal at the restaurant, he received a receipt that displayed both the expiration date and full number of his credit card). This is a violation of FACTA under 15 U.S.C. § 1681c(g)(1) (2006), which states: "[N]o person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." When a party willfully violates the statute, FACTA provides for a recovery of "any actual damages sustained by the consumer" or statutory damages of at least \$100 and no more than \$1000. 15 U.S.C. § 1681n(a)(1)(A) (2006).

⁴ *Leysoto*, 255 F.R.D. at 694, 697 (ruling that a class action was not the superior method of adjudication here and refusing to certify the class).

⁵ *Id.* at 697; *see* FED. R. CIV. P. 23(b)(3) (providing for the certification of a class where common questions of law and fact predominate and a class action is superior to all other methods of adjudication); *see also* *Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972) ("Students of [Rule 23(b)(3)] have been led generally to recognize that its broad and open-ended terms call for the exercise of some considerable discretion of a pragmatic nature.").

⁶ STUART ROSSMAN ET AL., CONSUMER CLASS ACTIONS § 10.5.2.5.5, at 167 (7th ed. 2010).

23.⁷ Second, a large aggregated statutory penalty threatens to violate the due process rights of defendants where the aggregated damages award is “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.”⁸ Finally, certification of such a class has the potential for an “*in terrorem* effect” on defendants, pressuring a defendant to settle even when a viable defense exists rather than face the risk of ruinous liability.⁹

In the context of the current economic recession, unemployment rates, and general anxiety about our national debt, it is difficult to justify the risk of such class action settlements or judgments bankrupting large corporations and costing hundreds, even thousands, of jobs when plaintiffs experienced little or no harm.¹⁰ This Comment argues that district court judges, in their discretion, should consider the potential annihilative effect of aggregated statutory damages on a defendant as a factor under the superiority requirement of Rule 23(b)(3) and deny certification of a FACTA truncation class when the proposed statutory recovery threatens the defendant’s survival.¹¹

⁷ *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (“It may be that the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purpose of both statutory damages and class actions.”).

⁸ *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66–67 (1919) (citations omitted) (establishing the standard for when statutory damages are contrary to the Due Process Clause).

⁹ *Parker*, 331 F.3d at 22 (The court noted that the aggregation of large numbers of claims for statutory damages could “create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements.”).

¹⁰ In August 2011, the national unemployment rate was 9.1%. *National Unemployment Update*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/?tabid=13307> (last visited Apr. 9, 2012). These aggregated FACTA settlements do threaten bankruptcy. For example, had the court certified the class and the plaintiff proven willful violation in *Spikings v. Cost Plus, Inc.*, the minimum statutory damages of \$100 per occurrence aggregated over the 3.4 million members of the potential class, resulting in at least \$340 million in damages, certainly would have put the company—with a net worth of only \$316 million—“out of business.” *Spikings v. Cost Plus, Inc.*, No. CV 06-8125-JFW (AJWx), 2007 U.S. Dist. LEXIS 44214, at *12 (C.D. Cal. May 25, 2007).

¹¹ The claim proposed in this Comment is based on Judge Wilkinson’s concurring opinion in *Stillmock v. Weis Mkts., Inc.* 385 F. App’x 267, 275–82 (4th Cir. 2010) (Wilkinson, J., concurring). In an appeal from the district court’s refusal to certify a class of FACTA truncation claims, Judge Wilkinson advocated that “annihilative

Part I begins by looking more closely at the problems created by aggregating statutory damage claims in a large class action. Part II provides an overview of how courts have addressed the issue of annihilative damages at the certification stage and how Congress has addressed such problems in similar consumer protection acts. Finally, Part III defines the annihilative damages standard and discusses how the application of this standard at the certification stage best circumvents the problems created by aggregated statutory claims. This Part also examines the public policy and economic arguments favoring this judicial solution, and demonstrates that enforcement of FACTA does not require annihilatory damages.

I. RAMIFICATIONS OF AGGREGATING STATUTORY DAMAGES

A. Distortion of Congressional Intent and the Purpose of Rule 23

The aggregation of claims for statutory damages in a class action under FACTA, resulting in an enormous damages award, distorts the purpose and intent of both the statutory scheme and Rule 23. The class action mechanism and statutory damages serve similar purposes. Federal Rule of Civil Procedure 23 was established to provide an avenue for parties to bring suits when the recovery being sought is so small it would not be “economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits.”¹² In cases in which plaintiffs experience actual harm—where plaintiffs suffered at the hands of a powerful corporation—class action adjudication is almost a necessity to ensure that plaintiffs are adequately

damages” be considered “in the context of Rule 23(b)(3)’s superiority requirement.” *Id.* at 278.

¹² *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 449 (6th Cir. 2002) (quoting *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980)); see *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 345–46 (S.D. Ga. 1996) (The class action mechanism “provide[s] a feasible means for asserting the rights of those who ‘would have no realistic day in court if a class action were not available.’” (citation omitted)). Class actions are meant to “vindicate individual rights” where an individual action would not be feasible. See Ted Frank, *Omission in FACTA Might Be Windfall for Plaintiff’s Bar*, CLASS ACTION WATCH, Sept. 2007, at 15, <http://www.fed-soc.org/publications/detail/class-action-watch-september-2007>.

compensated and defendants deterred from continuing the bad act. Similarly, FACTA provides statutory damages to encourage citizens to bring a claim for a violation of that particular statute even though actual damages may be "small or difficult to ascertain."¹³ Both Rule 23 and the availability of statutory damages create incentives for plaintiffs to sue when an otherwise individual actual damages suit would yield little financial recovery.

Combined, however, these two mechanisms result in over-deterrence, "potentially distort[ing] the purpose of both statutory damages and class actions."¹⁴ There is nothing to suggest that Congress or the committee that developed Rule 23 intended for FACTA and similar private-claim promoting statutes to operate in the context of class actions. The class action mechanism as applied to a FACTA suit effectively provides a windfall for cases in which plaintiffs already have incentive to sue individually for statutory damages and attorney's fees.¹⁵

¹³ Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 110 (2009) (quoting *Perrone v. Gen. Motors Acceptance Corp.*, 232 F.3d 433, 436 (5th Cir. 2000)) (internal quotation marks omitted); see 15 U.S.C. § 1681n (2006). In her article, Scheuerman recognizes that applying the class action mechanism to claims for statutory damages brought under FACTA may result in over-deterrence. Scheuerman, *supra*, at 111–15. After expressing concerns regarding due process issues, Scheuerman argues that courts should apply the guideposts established in *BMW of North American, Inc. v. Gore*, 517 U.S. 559 (1996) (the due process standard for punitive damages), at the certification stage to determine whether the aggregate statutory damages awards from a class would be unconstitutionally excessive. *Id.* at 146–51. Furthermore, she proposes that "[o]nce the due process violation created by an aggregated statutory damages award is acknowledged, class certification should be denied." *Id.* at 146 (citations omitted). This solution is broader than the annihilative standard suggested in this Comment because not all unconstitutionally excessive aggregate statutory damages awards will be annihilating to a defendant. Scheuerman recommends that the constitutionality of the potential award be assessed at the certification stage, whereas the annihilatory standard will prevent the court from reaching the question of unconstitutionally excessive awards in the extreme cases of ruinous liability. See *id.* at 146–48.

¹⁴ *Parker*, 331 F.3d at 22; see Scheuerman, *supra* note 13, at 111 ("Separately, statutory damages and class actions aim to respond to the risk that certain wrongs, namely those resulting in paltry financial losses, will go unaddressed. Combining the litigation incentives of statutory damages and the class action in one suit, however, creates the potential for absurd liability and over-deterrence.").

¹⁵ See *infra* Part III.B.1 (demonstrating the operation of the annihilative standard within the congressional intent and purpose behind FACTA and Rule 23).

B. Aggregated Statutory Damages and the Due Process Clause

When members of a putative class experience little or no actual economic damages from the disclosure of their card numbers, class certification for statutory rather than actual damages raises constitutional concerns as well as general questions of fairness.¹⁶ Aggregated statutory claims implicate the Due Process Clause when the statutory damages awarded are highly disproportionate to the actual harm. According to the Supreme Court in *St. Louis, I.M. & S. Railway Co. v. Williams*, a statutory penalty may violate the Due Process Clause when the statutory damage award is “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.”¹⁷ *Williams* involved a law regulating rates charged by railroads, which imposed a per-violation penalty on a railroad of fifty to three-hundred dollars each time it collected rates higher than those prescribed by the statute.¹⁸ The Court ruled that this “essentially penal” statute did not violate the Due Process Clause because it was not “so severe and oppressive as to be wholly disproportioned to the offense.”¹⁹

Courts that recognize a due process limitation on statutory damages awards generally cite *State Farm Mutual Automobile Insurance Co. v. Campbell* in support.²⁰ In *Campbell*, the Supreme Court stated that due process “prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor” because such a punishment “constitutes an arbitrary deprivation of property.”²¹

¹⁶ *Stillmock*, 385 F. App'x at 278 (Wilkinson, J., concurring) (“Certifying a class action that would impose annihilative damages where there has been no actual harm from identity theft could raise serious constitutional concerns . . .”); see Michael E. Chaplin, *What's So Fair About the Fair and Accurate Credit Transactions Act?*, 92 MARQ. L. REV. 307, 312 (2008) (“It offends fundamental notions of fairness when litigants, without actual injury (and without the prospect of actual injury), are allowed to use the courts as a means of financial gain.”); see also *Anderson v. Capital One Bank*, 224 F.R.D. 444, 452–53 (W.D. Wis. 2004).

¹⁷ 251 U.S. 63, 67 (1919) (citations omitted).

¹⁸ *Id.* at 64. Here the railway was charging sixty-six cents more than the prescribed rate. *Id.*

¹⁹ *Id.* at 66–67. The punishment-to-harm ratio in this case was between 50 to 0.6 and 300 to 0.6. *Id.*

²⁰ See *Stillmock*, 385 F. App'x at 278 (Wilkinson, J., concurring) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (same).

²¹ *Campbell*, 538 U.S. at 416–17 (citations omitted).

Campbell involved an action brought against an automobile liability insurer for bad-faith failure to settle within the policy limits, fraud, and intentional infliction of emotional distress.²² The Supreme Court held that an award of \$145 million in punitive damages violated due process where the plaintiffs recovered only \$1 million in compensatory damages.²³ The *Campbell* Court applied the *Gore* guideposts, established in *BMW of North America, Inc. v. Gore*, and found that the punitive award at issue was "neither reasonable nor proportionate to the wrong committed."²⁴

The rule of excessive punishment is analogous to statutory damages because statutory damages serve both a punitive and compensatory function.²⁵ Punitive damages serve "deterrence and retribution" functions, while compensatory damages are meant to "redress the concrete loss that the plaintiff has suffered."²⁶ Statutory damages, specifically those provided for under FACTA, are intended to deter violations of the statute by encouraging citizens to act as private attorneys general and enforce the statute with civil suits.²⁷ The punitive effect of statutory damages, however, raises Due Process Clause concerns. This punitive effect, "when aggregated across a large number of similar acts, can grow so enormous that it becomes an unconstitutionally excessive punishment."²⁸ Given their punitive function, courts should hold statutory damages to a constitutional standard similar to the one applied to the punitive damages award in *Campbell*—damages must not be so "severe" in proportion to the actual harm that occurred.

The Second Circuit recognized this due process concern in *Parker v. Time Warner Entertainment Co.*, stating that when statutory damages "expand . . . so far beyond the actual damages

²² *Id.* at 414.

²³ *Id.* at 426, 429.

²⁴ *Id.* at 429; see *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

²⁵ See J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525, 527 (2004) (noting that a statutory damages award has both a compensatory and a punitive component).

²⁶ *Campbell*, 538 U.S. at 416.

²⁷ Scheuerman, *supra* note 13, at 111.

²⁸ Barker, *supra* note 25, at 526.

suffered," they function more like punitive damages and may raise due process issues.²⁹ In his concurring opinion in *Parker*, Judge Newman quoted the "severe and oppressive" standard applied in *Williams* and compared the due process objections to aggregated statutory damages awards to those identified by the Supreme Court in *Campbell*.³⁰

Although the Eleventh Circuit declined to address the as-applied constitutionality of an aggregated statutory damages award, the court did find 15 U.S.C. § 1681n constitutional on its face.³¹ The defendant in *Harris v. Mexican Specialty Foods, Inc.* challenged the statutory damages provision established by the Fair Credit Reporting Act (FCRA), and imposed for FACTA violations, as unconstitutionally vague and excessive on its face, and violative of the Due Process Clause as applied to the defendant in the class action suit.³² The court held that the provision was constitutional on its face because section 1681n only allows for statutory damages in lieu of a claim for actual damages and since some future plaintiff might seek statutory damages rather than actual damages from a FACTA violation.³³ The Eleventh Circuit has stated, however, that it is likely to find that

²⁹ 331 F.3d 13, 22 (2d Cir. 2003).

³⁰ *Id.* at 26 (Newman, J., concurring) (quoting *St. Louis, I.M. & S Ry. Co. v. Williams*, 251 U.S. 63, 66–67 (1919)) (internal quotation marks omitted).

³¹ *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1312–13 (11th Cir. 2009); see 15 U.S.C. § 1681n (2006).

³² *Id.* at 1307. The Eleventh Circuit ruled that the defendants' unconstitutionally excessive as applied claims were not yet ripe, and thus decline to rule on the issue. *Id.* at 1310. According to the *Harris* opinion, the pre-trial determinations of unconstitutional excessiveness require assumptions and should be reviewed after the jury has handed down damages. *Id.* at 1309–10 ("The district court therefore lacked jurisdiction to consider whether the FCRA's statutory-damages provision . . . will yield an unconstitutionally excessive verdict as applied to these defendants.").

³³ *Id.* at 1313. The court relied on Eleventh Circuit Court precedent that the "mere possibility of a constitutional application is enough to defeat a facial challenge to [a] statute." *Id.* (citing *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1228 (11th Cir. 1982)). When sought in an individual claim, this statutory penalty creates, at the most extreme, a damages-to-harm ratio of 1000 to 0 (if the plaintiff enforcing the FACTA violation suffered no actual harm). When this statutory penalty is aggregated across tens of thousands of claims, however, the as-applied constitutional analysis differs—with ratios as high as 4.6 million to 0. See *infra* Part III.B.2 for a complete as-applied due process analysis of aggregated statutory damages awarded in a FACTA claim.

a class action was not superior when the potential damages are so disproportionate to any harm suffered.³⁴

The due process implications are much more than just the speculative concerns of a few judges.³⁵ In fact, if a class aggregates thousands of claims that allege no actual harm, statutory damages for a FACTA violation will almost certainly be declared unconstitutionally excessive when analyzed according to due process factors traditionally applied to punitive damages.³⁶

C. Blackmail Settlements

Defendants facing enormous potential liability, which may fatally impact their business, sometimes agree to large settlements and abandon possible defenses.³⁷ In a speech given in 1972, Judge Friendly first referred to settlements induced by the possibility of an immense class-action judgment as "blackmail settlements."³⁸ This term expresses the concern that plaintiffs will seek class certification to threaten or intimidate the defendant into settling.³⁹ The court in *In re Rhone-Poulenc* addressed the settlement pressure concern after plaintiffs successfully certified some of their class action claims against a blood products manufacturer for allegedly infecting them with HIV.⁴⁰ Judge Posner reasoned that the defendant might "not wish to roll [the] dice" because it potentially faced liability for \$25 billion and could not be absolutely certain of prevailing on the merits of the case.⁴¹ The Seventh Circuit ultimately decertified the class based on

³⁴ *Klay v. Humana, Inc.*, 382 F.3d 1241, 1271 (11th Cir. 2004).

³⁵ See *infra* Part III.B.2.

³⁶ These due process factors are laid out in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575–84 (1996), and *State Farm Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

³⁷ *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 281 (4th Cir. 2010) ("Companies may be forced to settle in the face of such annihilating liability, even if they have a strong defense. . . . [T]he substantial costs associated with settlement will inevitably be passed on to consumers"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle" (citing Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 958 (1995))).

³⁸ Aaron B. Lauchheimer, Note, *A Classless Act: The Ninth Circuit's Erroneous Class Certification in Dukes v. Wal-Mart, Inc.*, 71 BROOK. L. REV. 519, 550 (2005).

³⁹ *Id.* at 549–50.

⁴⁰ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1294 (7th Cir. 1995).

⁴¹ *Id.* at 1298.

concerns about settlement pressure created by aggregated claims, which force defendants to “stake their companies on the outcome of a single jury trial.”⁴²

In the article, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, Richard Nagareda divides the concept of class-action settlement pressure into two aspects of the class action mechanism—the addition effect and the amplification effect.⁴³ The addition effect recognizes that the certification of a class increases the number of claims a defendant will face because plaintiffs typically have greater incentive to join a class action than to bring an individual suit for an identical claim.⁴⁴ Although this addition effect is the exact result intended by the authors of Rule 23, it raises concerns when the class action involves claims for minimum statutory damages.⁴⁵ In such situations, the addition effect distorts the “remedial scheme” Congress established in setting forth statutory damages “seemingly . . . with the scenario of individual litigation in mind.”⁴⁶ The addition effect of statutory damages effectively multiplies the pressure because the defendant, if liable, faces guaranteed damages.

The amplification effect of a class action is based on the risk associated with an all-or-nothing judgment.⁴⁷ The “variance in outcomes is much greater” in a class action suit than if the defendant were facing the exact same number of individual claims.⁴⁸ For example, if a class of 100,000 is certified in a FACTA statutory damages suit, the defendant will either win the case and incur no liability, or lose the case and incur between \$10 million and \$100 million in damages. Alternatively, if the defendant faced 100,000 individual claims, some would likely be dismissed while

⁴² *Id.* at 1299.

⁴³ Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1881 (2006).

⁴⁴ *Id.* (“In *Rhone-Poulenc*, this addition effect consisted of the contrast between the 300 or so claims that Judge Posner estimated defendants would face in a world of individual trials and the ‘thousands’ of claims that they would face . . . in the event of class certification.” (quoting *Rhone-Poulenc*, 51 F.3d at 1298)).

⁴⁵ *Id.* at 1885 (“Case law identifies one scenario for class action litigation in which the addition effect, simply as addition, rises to the level of normative concern.”).

⁴⁶ *Id.* at 1886.

⁴⁷ *Id.* at 1881–82.

⁴⁸ *Id.*

others might incur liability for the defendant. But the variance in outcome of each individual case is much smaller: either no liability or between \$100 and \$1000 in statutory damages. When combined with the addition effect, the amplification effect increases the pressure greatly on a defendant to settle rather than risk an-all-or-nothing judgment.

The authors of Rule 23, recognizing the legitimacy of settlement pressure, included in Rule 23(f) the ability to bring an interlocutory appeal of the decision to certify the class.⁴⁹ If a class is certified and the defendant caves to the pressure, however, an appellate court will never have the opportunity to review the ruling that forced them to settle—class certification.⁵⁰

II. BACKGROUND

A. *The Origins of the Annihilative Argument*—*Ratner v. Chemical Bank New York Trust Co.*

Subsequent cases have credited Judge Frankel's opinion in the 1972 district court case of *Ratner v. Chemical Bank New York Trust Co.* with first relying on the concept of annihilatory damages to find that a class action was not the superior method of adjudication.⁵¹ Although none of the putative class members suffered more than nominal damages, the plaintiffs in *Ratner* sought statutory damages under the Truth in Lending Act (TILA) for the defendant's failure to disclose an annual percentage rate to

⁴⁹ Lauchheimer, *supra* note 38, at 550. The Advisory Committee listed one factor in the inclusion of this provision: "An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *Id.* (alteration in original) (quoting FED. R. CIV. P. 23 advisory committee's note) (internal quotation marks omitted).

⁵⁰ *Rhone-Poulenc*, 51 F.3d at 1298; see *infra* Part III.B.3 (revisiting settlement pressure and demonstrating how applying the annihilative standard at the certification stage protects defendants from the most extreme settlement pressure).

⁵¹ *Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 413 (S.D.N.Y. 1972); David L. Permut & Tamra T. Moore, *Recent Developments in Class Actions: The Fair Credit Reporting Act*, 61 BUS. LAW. 931, 939 (2006) ("Many of these courts rely on the rationale utilized long ago in *Ratner v. Chemical Bank* and its progeny, which served as a roadblock to the certification of TILA classes prior to the enactment of a class action damages cap." (citation omitted)).

its cardholders.⁵² Similar to the statutory damages provided for violations of FACTA, section 130(a) of TILA guarantees damages of at least \$100 plus reasonable attorneys' fees and other costs when liability is proven.⁵³ Judge Frankel ruled that the class action was not superior because the damages and attorneys' fees allowed under TILA provide sufficient incentive for the plaintiff to bring an individual suit, and because the class action of approximately 130,000 members would expose the defendant to at least \$13 million in damages.⁵⁴ Frankel was persuaded by the defendant's argument that this recovery would be a "possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to [the] defendant."⁵⁵ But, he went further than denying certification of the class under these particular circumstances and held that the class action mechanism was "essentially inconsistent" with the statutory damages provided by Congress in TILA.⁵⁶

Judge Frankel believed that the discretion left to trial judges through the open-ended terms of Rule 23(b)(3) called for him to make a "pragmatic" judgment as to whether a class action was proper.⁵⁷ The *Ratner* rationale spread like wild fire, and courts routinely refused to certify classes in TILA cases.⁵⁸ The Ninth and

⁵² *Ratner*, 54 F.R.D. at 413 ("[P]laintiff suffered no damages at all or . . . , at most, he may be supposed to have been damaged in some amount representing a small fraction of \$100." (footnote omitted)).

⁵³ Truth in Lending Act § 130(a), 15 U.S.C. § 1640(a) (2006).

⁵⁴ *Ratner*, 54 F.R.D. at 416.

⁵⁵ *Id.*

⁵⁶ *Id.* Following the *Ratner* opinion, the Tenth Circuit refused to hold that a class action is an improper method of adjudication of TILA claims "under all circumstances." *Wilcox v. Commerce Bank of Kan. City*, 474 F.2d 336, 347-48 (10th Cir. 1973). The court, however, affirmed the district court's finding that the class action was inferior based on Judge Frankel's annihilatory punishment rationale. *Id.* at 348-49.

⁵⁷ *Ratner*, 54 F.R.D. at 416.

⁵⁸ See, e.g., *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 770, (3d Cir. 1974) (Aldisert, J., dissenting); *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 348 (N.D. Ill. 2002). The *Katz* court found:

Appellant's basic theme, sounded in [*Ratner*] and repeated in some 34 reported and unreported district court opinions chanting the same litany, is that a class action should not lie because in the event the court finds liability, an award of the statutory penalty of \$100 for each class member would defeat the purpose of [TILA] and, moreover, would threaten the solvency of the appellant because the statutory penalty would greatly exceed potential actual damages.

Tenth Circuits also adopted Frankel's reasoning in the years immediately following *Ratner*.⁵⁹ In *Wilcox v. Commerce Bank of Kansas City*, a TILA action, the Tenth Circuit upheld the district court's decision to deny certification of a class based in part on Judge Frankel's rationale.⁶⁰ The district judge in *Wilcox* had voiced concerns that certification of a class of approximately 180,000 members claiming statutory damages of at least \$100 would result in an annihilatory punishment.⁶¹

Several district courts adjudicating FACTA claims have also adopted Judge Frankel's reasoning from *Ratner*.⁶² Recent cases citing *Ratner*, however, have focused as much on the disproportionality portion of his argument as on the portion concerning the effect of an enormous statutory damage award on the defendant. For example, prior to the decision in *Bateman v. American Multi-Cinema, Inc.*, district courts in the Ninth Circuit "did not deny class certification solely because of the possible financial impact it would have on the defendant, but because of the disproportionality of the damages award in relation to the harm actually suffered by the class."⁶³

Katz, 496 F.2d at 770 (citations omitted).

⁵⁹ See *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 234-35 (9th Cir. 1974) (noting in dicta that class actions are not superior when aggregation would carry the statutory damage regime to an "absurd and stultifying extreme" (quoting *Ratner*, 54 F.R.D. at 414)); *Wilcox*, 474 F.2d at 341-47.

⁶⁰ *Wilcox*, 474 F.2d at 342.

⁶¹ *Id.* at 340, 342. Judge O'Connor considered the potential aggregated remedy to be a "horrendous, possibly annihilating punishment, unrelated to any damage." *Id.* at 342 (internal quotation marks omitted).

⁶² See *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 715 (9th Cir. 2010); *Azoiani v. Love's Travel Stops & Country Stores, Inc.*, No. EDCV 07-90 ODW (OPx), 2007 WL 4811627 (C.D. Cal. Dec. 18, 2007); *Vartanian v. Estyle, Inc.*, No. CV 07-0307 DSF (RCx), 2007 WL 4812286 (C.D. Cal. Nov. 26, 2007); *Saunders v. Trattoria*, No. CV 07-1060 SJO (PJWx), 2007 WL 4812287 (C.D. Cal. Oct. 23, 2007); *Price v. Lucky Strike Entm't, Inc.*, No. CV 07-960-ODW (MANx), 2007 WL 4812281 (C.D. Cal. Aug. 31, 2007); *Najarian v. Avis Rent A Car Sys.*, No. CV 07-588-RGK (Ex), 2007 WL 4682071 (C.D. Cal. June 11, 2007).

⁶³ *Soualian v. Int'l. Coffee & Tea LLC*, No. CV 07-502-RGK (JCx), 2007 WL 4877902, at *2 (C.D. Cal. June 11, 2007) (footnote omitted) (citing *Ratner*, 54 F.R.D. at 416). This Comment does not seek to discount proportionality. Instead, the annihilatory standard includes the proportionality argument because annihilatory damages are inherently disproportionate when no actual harm is alleged.

B. Circuit Courts Ruling on the Issue of Annihilation at the Certification Stage

Although few circuit courts of appeal have addressed whether annihilatory damages can be considered at the certification stage in the context of FACTA claims, circuits have found that the size of potential liability is generally an appropriate superiority factor to be examined at that time. The leading opinions from the Fifth and Eleventh Circuit Courts of Appeal favor including the size of the potential liability and the effect on the defendant—particularly the defendant's due process rights—as part of the non-exhaustive list of superiority factors.⁶⁴ But, the Seventh and Ninth Circuits have taken the opposite position, ruling that the size of a potential damage award is not a valid reason for a trial judge to refuse to certify a 23(b)(3) class.⁶⁵ The Second Circuit, as evidenced by the opinion in *Parker v. Time Warner Entertainment Co.*, seems to straddle the fence.⁶⁶

1. Circuit Court Opinions Recognizing the Effect of Potential Liability as a Superiority Factor

In *Castano v. American Tobacco Co.*, the Fifth Circuit reversed the district court's certification of a mass tort class action against the tobacco industry, and found that the class failed the superiority requirement because of the effect certification would have on the defendant.⁶⁷ The circuit court recognized that such a massive tort class dramatically increased the defendant's stakes because, if found liable, it would have faced "significantly higher damage awards" and an "insurmountable pressure" to settle prior

⁶⁴ See *Klay v. Humana, Inc.*, 382 F.3d 1241 1271 (11th Cir. 2004); *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246 (11th Cir. 2003); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

⁶⁵ See *Bateman*, 623 F.3d 708; *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 951 (7th Cir. 2006).

⁶⁶ See *Parker v. Time Warner Entm't Co.*, 331 F.3d 13 (2d Cir. 2003).

⁶⁷ 84 F.3d at 737. *Castano* was described as "what may be the largest class action ever attempted in federal court." *Id.* The members of the plaintiff class sought compensatory and punitive damages for injury caused by nicotine addiction, claiming the tobacco defendants "fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature." *Id.*

to adjudication.⁶⁸ Refusing to "commit[] the fate of an entire industry . . . to a single jury," the Fifth Circuit decertified the class, reasoning that individual suits were a viable option for plaintiffs and lacked the risks the defendants otherwise faced.⁶⁹

The Eleventh Circuit expressly allows examination of the effect a potential damages award will have on a defendant when determining whether or not to certify a class action under Rule 23(b)(3).⁷⁰ Within the majority opinions from *Klay v. Humana, Inc.* and *London v. Wal-Mart Stores, Inc.*, the Eleventh Circuit noted in dicta: "In cases where the defendants' potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff, we are likely to find that individual suits, rather than a single class action, are the superior method of adjudication."⁷¹

Both of these cases cited Judge Frankel's *Ratner* rationale for refusing to certify a class when the statutory damages are enormous and disproportionate.⁷² The claims in *Klay*, however, involved violations of the RICO Act, which provides for trebling of actual damages suffered by the plaintiff—not statutory damages—meaning the potential damages imposed on the defendant would not have been totally out of proportion to the actual harm suffered by the plaintiffs.⁷³ The TILA class in *London* was decertified because the class failed to satisfy all four elements of Rule 23(a), and thus it was unnecessary to examine the size of the potential damages award and superiority.⁷⁴

⁶⁸ *Id.* at 746 (citations omitted).

⁶⁹ *Id.* at 752.

⁷⁰ See *Klay v. Humana, Inc.*, 382 F.3d 1241 1271 (11th Cir. 2004).

⁷¹ *Id.* (quoting *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003)) (internal quotation marks omitted).

⁷² *Id.* (citing *Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972)); *London*, 340 F.3d at 1255 n.5 (same).

⁷³ *Klay*, 382 F.3d at 1271–72.

⁷⁴ *London*, 340 F.3d at 1253–55 (ruling that *London*, the named plaintiff, was not proper to represent the class).

2. Circuit Courts Ruling that Consideration of the Size of a
Potential Damages Award at the Certification Stage is
Improper

In *Murray v. GMAC Mortgage Corp.*, the Seventh Circuit ruled that a “ruinously high” potential award was not a proper ground for refusing to certify a class.⁷⁵ Judge Easterbrook reasoned that refusing to certify a class on account of the potentially enormous and destructive damages award would subvert the FCRA, which Congress had not yet amended to cap the aggregated statutory damages.⁷⁶ After noting that the trial judge referred to certification of this particular FCRA class as an “abuse[] of the class action mechanism,” the court attributed the enormity of the damages not to an abusive intent by the plaintiffs, but to Congress’s guarantee of damages between \$100 and \$1000 coupled with the more than one million violations of the FCRA by the defendant.⁷⁷

In the FACTA case *Bateman v. American Multi-Cinema, Inc.*, the Ninth Circuit—citing reasoning from *Murray*—ruled that “allowing consideration of the potential enormity of any damages award would undermine the compensatory and deterrent purposes of FACTA.”⁷⁸ Before the *Bateman* opinion came down, district courts in the Ninth Circuit had continuously refused to certify classes in FACTA cases based on the reasoning that a class that resulted in enormous liability disproportionate to any actual harm was not the superior method of adjudication.⁷⁹ But, *Bateman* superseded these district court decisions, creating new precedent in the Ninth Circuit that “limit[ing] class availability merely on the basis of *enormous* potential liability . . . would subvert

⁷⁵ 434 F.3d 948, 951 (7th Cir. 2006).

⁷⁶ *Id.* at 954 (“Maybe suits such as this will lead Congress to amend the Fair Credit Reporting Act; maybe not. While a statute remains on the books, however, it must be enforced rather than subverted.”).

⁷⁷ *Id.* at 953.

⁷⁸ 623 F.3d 708, 722 (9th Cir. 2010).

⁷⁹ See *Blanco v. CEC Entm’t Concepts L.P.*, No. CV 07-0559 GPS (JWJx), 2008 WL 239658 (C.D. Cal. Jan. 10, 2008); *Azoiani v. Love’s Travel Stops & Country Stores, Inc.*, No. EDCV 07-90 ODW (OPx), 2007 WL 4811627 (C.D. Cal. Dec. 18, 2007); *Najarian v. Avis Rent A Car Sys.*, No. CV 07-588-RGK (Ex), 2007 WL 4682071 (C.D. Cal. June 11, 2007); *Soualian v. Int’l Coffee & Tea LLC*, No. CV 07-0502-RGK (JCx), 2007 WL 4877902 (C.D. Cal. June 11, 2007); *Spikings v. Cost Plus, Inc.*, No. CV 06-8125-JFW (AJWx), 2007 U.S. Dist. LEXIS 44214 (C.D. Cal. May 25, 2007).

congressional intent.”⁸⁰ The court implied that this holding would not apply if the defendant claims that the aggregate damages award from a FACTA class action would result in bankruptcy.⁸¹ The court instead stated that it “reserve[d] judgment as to whether a showing of *ruinous liability* would warrant denial of class certification in a FACTA or similar action.”⁸² In doing so, the Ninth Circuit distinguished between refusing to certify a class on the basis of enormous liability—liability that would be “unpleasant to a behemoth company”—and refusing to certify a class where the potential aggregate liability would put the defendant out of business.⁸³

3. The Second Circuit: It Could Go Either Way

In *Parker v. Time Warner Entertainment Co.*, the Second Circuit vacated a district court decision refusing to certify a class.⁸⁴ The lower court concluded that a class action was not superior when potential liability was “grossly disproportionate” to any harm suffered by members of the plaintiff class.⁸⁵ The circuit court disagreed with the lower court’s conclusion because it was based on assumptions rather than findings of fact.⁸⁶ The district court had barred any discovery leaving the record void of any evidence as to the size of the class, the number of plaintiffs who suffered actual damages, or the potential size of the damages that the defendant faced.⁸⁷ The circuit court, however, left the door open for district courts to examine the size of potential liability as a superiority factor when presented with adequate evidence.⁸⁸

⁸⁰ *Bateman*, 623 F.3d at 723 (emphasis added) (internal quotation marks omitted).

⁸¹ *Id.*

⁸² *Id.* (emphasis added) (internal quotation marks omitted).

⁸³ *Id.* (quoting *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 960–61 (9th Cir. 2005) (per curiam)) (internal quotation marks omitted).

⁸⁴ 331 F.3d 13, 21 (2d Cir. 2003). *Parker* involved an action for monetary and injunctive relief for violations of the subscriber privacy provisions of the Cable Communications Policy Act. *Id.* at 15.

⁸⁵ *Id.* at 21.

⁸⁶ *Id.*

⁸⁷ *Id.* at 21–22.

⁸⁸ *Id.* The court stated that “[b]ecause the district court decided Time Warner’s motion without the factual support necessary to support its legal conclusions,” the refusal to certify was not proper. *Id.* at 22. It did not, however, explicitly say that it was

In his majority opinion, Judge Underhill recognized several issues that may arise when statutory damages are combined with the class action mechanism, such as due process concerns, distortion of the purpose behind both the statutory damages regime and Rule 23, and a possible *in terrorem* effect on defendants leading to unfair settlements.⁸⁹ But, he stated that the due process issues should be addressed by “nullify[ing] [the] effect and reduc[ing] the aggregate damage award,” not by denying certification.⁹⁰ Thus, it remains unclear how the Second Circuit would rule on annihilatory damages as a superiority factor if properly presented with the issue and supportive evidence.

C. District Court Treatment of Aggregated Statutory Damages Claimed Under FACTA

To develop a full picture of the current judicial dispute over the appropriateness of considering whether an enormous aggregate statutory damages award will annihilate a defendant at the class certification stage, it is helpful to examine how district courts have interpreted precedent in circuits that have addressed the issue. The analyses of district court opinions from the Eleventh and Seventh Circuits prove especially helpful.

1. District Court Opinions from the Eleventh Circuit

In *Leysoto v. Mama Mia I, Inc.*, the district court in south Florida ruled that a class action was not the superior method of adjudication.⁹¹ It held that imposing a potential statutory damages award of between \$46 million and \$4.6 billion on a local restaurant business with net assets of only \$40,000 “would not be a fair, efficient, or cost-effective adjudication of the controversy.”⁹² District Judge Seitz relied on dicta from *London* as authority that

improper to deny certification based on the effect the potential enormous damage award would have on the defendant. *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* (“And it may be that in a sufficiently serious case the due process clause might be invoked, not to prevent certification, but to nullify that effect and reduce the aggregate damage award.” (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996))).

⁹¹ 255 F.R.D. 693, 698 (S.D. Fla. 2009); see *supra* notes 1–5.

⁹² *Leysoto*, 255 F.R.D. at 698.

district courts in the Eleventh Circuit may consider potential damages at the class certification stage.⁹³ The judge believed that the statutory damages, attorneys' fees, and costs provide individual plaintiffs with adequate opportunity to seek compensation and enforce FACTA.⁹⁴ That belief, in conjunction with her concern that class certification might be used as a "Sword of Damocles" to hang over the defendant as pressure to settle and that the "annihilation associated with certification does not serve the purpose of [FACTA] legislation," led her to deny certification of the class.⁹⁵

Similarly, in *Ehren v. Moon, Inc.*, the court refused to certify and ruled that a class was not superior "where the complaint contain[ed] no indication of any actual damages" and "the aggregated relief could be oppressive in consequence."⁹⁶ The court cited dicta from both *London* and *Klay* that implied the Eleventh Circuit would find a class fails the Rule 23(b)(3) superiority requirement where potential liability is "enormous and completely out of proportion to any harm suffered by the plaintiff."⁹⁷ Similar to the *Leysoto* decision, the court reasoned that the provision of statutory damages, reasonable costs, and attorneys' fees presented "adequate alternatives and incentives" for plaintiffs with claims under FACTA to bring individual suits.⁹⁸ The court found these individual suits superior to a class action.⁹⁹

On the other hand, in *Keller v. Macon County Greyhound Park, Inc.* a district court in Alabama certified a FACTA class and declined to extend *London's* observation that a class may not be superior where the potential damages are out of proportion to any harm suffered by the plaintiff.¹⁰⁰ The *Keller* court refused to adopt

⁹³ *Id.* at 697 ("*London* indicates that lower courts may consider potential class damages, in conjunction with the plaintiff's actual injury . . ." (citing *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003))).

⁹⁴ *Id.* at 699.

⁹⁵ *Id.*

⁹⁶ *Ehren v. Moon, Inc.*, No. 09-21222-Civ, 2010 WL 5014712, at *2 (S.D. Fla. Dec. 3, 2010).

⁹⁷ *Id.* (quoting *Klay v. Humana, Inc.*, 382 F.3d 1241, 1271 (11th Cir. 2004); *London*, 340 F.3d at 1255 n.5) (internal quotation marks omitted).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Keller v. Macon Cnty. Greyhound Park, Inc.*, No. 3:07-CV-1098-WKW [WO], 2011 WL 1085976, at *10-11 (M.D. Ala. Mar. 24, 2011).

this notion because it appeared only in dicta.¹⁰¹ This court also distinguished *Leysoto* and *Ehren* because the damages in those cases had a potentially ruinous effect on the defendant, whereas in *Keller* the putative class sought a much smaller statutory damages award and the defendant had a relatively higher net worth.¹⁰² Apparently, the *Keller* court did not foresee that the damages resulting from this particular class could have an annihilative effect on the defendant, and thus the potential liability was insufficient for finding the class inferior.

2. District Court Opinion From the Seventh Circuit

Following precedent established in *Murray*, a district court in Indiana in *In re H & R Block Mortgage Corp.* ruled that the argument that aggregated statutory damages would result in bankruptcy was premature at the certification stage.¹⁰³ The *H & R Block* case noted that, in *Murray*, the Seventh Circuit reversed a decision refusing to certify an analogous FCRA class and rejected the argument that such a class was not superior because of the size of the potential damages, the possible effect on the defendant, and the disproportionality to the harm suffered by the plaintiff.¹⁰⁴ Additionally, it reasoned that the defendant faced potentially enormous class damages not because of certification in the context of claims for statutory damages, but because the defendant chose to violate the statute numerous times.¹⁰⁵ Persuaded by this reasoning, the court found *Murray* to be binding precedent.¹⁰⁶

D. Legislative Caps of Aggregated Statutory Damages in Other Consumer Protection Acts

The Consumer Credit Protection Chapter of Title 15 of the United States Code consists of seven consumer protection

¹⁰¹ *Id.* at *11.

¹⁰² *Id.*; see *supra* note 4 and accompanying text (comparing the statutory damages sought to the defendant's net worth in *Leysoto*).

¹⁰³ *In re H & R Block Mortg. Corp.*, Prescreening Litig., 244 F.R.D. 490, 495 (N.D. Ind. 2007).

¹⁰⁴ *Id.* at 494–95.

¹⁰⁵ *Id.* at 496.

¹⁰⁶ *Id.* at 495.

subchapters: Consumer Credit Disclosure, Credit Repair Organizations, Credit Reporting Agencies, Equal Credit Opportunity, Debt Collection Practices, Electronic Fund Transfers, and Truth in Lending Regulations.¹⁰⁷ Six of these seven subchapters—all but the Credit Repair Organizations subchapter—provide for statutory damages. The civil liability section of the Fair Credit Reporting Act, section 1681n, codified under the Credit Reporting Agencies subchapter, applies to all willful FACTA violations.¹⁰⁸

Section 1681n provides for “any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000.”¹⁰⁹ The other subchapters that provide for statutory damages, including TILA, the Fair Debt Collection Practices Act, and the Equal Credit Opportunity Act, explicitly address aggregation of these damages in class actions.¹¹⁰ When one of these damages provisions is implicated in a class action, the available aggregated damages are limited to “not [] more than the lesser of \$500,000 or 1 per centum of the net worth of the [defendant].”¹¹¹ The statutory damages provision established by FCRA and applicable to FACTA, however, does not mention aggregation or class actions.¹¹² FCRA (which encompasses FACTA) is the only consumer protection act codified in Title 15, Chapter 41 of the code that provides for statutory damages but does not provide guidelines for when these damages are aggregated in a class action.¹¹³

¹⁰⁷ 15 U.S.C. Chapter 41 (Consumer Credit Protection).

¹⁰⁸ 15 U.S.C. § 1681n (2006).

¹⁰⁹ § 1681n(a)(1)(A).

¹¹⁰ 15 U.S.C. §§ 1640 (2006) (Truth in Lending Act), 1691e (2006) (Equal Credit Opportunity Act), 1692k (2006) (Fair Debt Collection Practices Act), 1693m (2006) (Electronic Funds Transfer Act).

¹¹¹ § 1640(a)(2)(b); *accord* §§ 1691e, 1692k, 1693m. It should be noted that the current statutory damages limit of \$500,000 will soon be increased to a limit of \$1 million. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1416, 124 Stat. 2153 (2010). References herein to the statutory damages limit or cap are to the current limit of \$500,000.

¹¹² See § 1681n.

¹¹³ See *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 347–48 (N.D. Ill. 2002) (“Each of the other subchapters specifically provides a cap on class action damages. The FCRA does not.” (citations omitted)).

III. THE ANNIHILATIVE DAMAGES STANDARD PROVIDES THE
BEST SOLUTION WHEN JUDGES ARE FACED WITH THE EXTREME
CIRCUMSTANCES CREATED BY AGGREGATING STATUTORY
DAMAGES IN A FACTA CLASS ACTION

Although the problems of aggregated FACTA statutory damages claims would best be resolved by a legislative cap similar to that provided in TILA, it is unclear when and if Congress will take action to limit the aggregation of damages sought in FACTA actions under section 1681n. Until Congress provides a statutory solution, trial judges should exercise their Rule 23 discretion and consider both the potential size of the recovery and the impact on the defendant as factors of superiority, and deny class certification when the potential statutory damages are annihilative.

Refusing to certify a class seeking potential aggregated statutory damages that would financially cripple the defendant remains true to the intent of both Rule 23 and the statutory damages provision. This solution will not totally preempt the due process concerns raised by disproportionate statutory damages or always remove the pressure to settle, which may build even in aggregated claims for statutory damages that do not rise to the annihilatory level. But, refusing to certify classes that do present a risk of annihilation allows judges to avoid the most extreme manifestations of these concerns.

A. Defining the Annihilative Standard

As Judge Wilkinson argued in *Stillmock*, trial judges should refuse to certify a class where the aggregated statutory damage award is likely to be annihilative.¹¹⁴ Crushing or ruinous liability occurs when the liability imposed is likely to leave the defendant insolvent or in grave risk of insolvency.¹¹⁵ Therefore, the

¹¹⁴ *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 278 (4th Cir. 2010) (Wilkinson, J., concurring).

¹¹⁵ In his article *Class Retreat From Mass Deceit*, Jeffrey Payne implies that defendants can raise a "crushing liability defense" when insolvent or otherwise severely financially handicapped. Jeffrey A. Payne, Note, *Class Retreat From Mass Deceit: Assessing Class Action Compatibility with Truth in Lending Act Rescission*, 43 LOY. L.A. L. REV. 1207, 1231 (2010).

annihilative standard should be defined as a damages award that is likely to leave the defendant *imminently insolvent*.¹¹⁶

In defining *insolvent* for the purposes of the annihilative standard, it is helpful to draw parallels to the Uniform Commercial Code and the Federal Bankruptcy Code. Insolvency is defined in the U.C.C. as "ceas[ing] to pay debts in the ordinary course of business" or being unable "to pay debts as they become due."¹¹⁷ Similarly, the Bankruptcy Code defines insolvency as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation."¹¹⁸ Defining the annihilative standard as a damages award that would likely leave the defendant in imminent danger of insolvency, judges should refuse to certify a class where the statutory award will likely leave the defendant company in immediate danger of being unable to pay its debts.¹¹⁹

When voicing concern about enormous damages and the effect on defendants, judges often speak in terms and phrases comparable to the imminent insolvency standard. For example, the district court in *Murray v. New Cingular Wireless Services, Inc.* ruled that the size of the potential damages award did not constitute a failure of the superiority requirement when the defendant did not claim that the award would "deal a fatal financial blow to its business."¹²⁰ Similarly in *Haynes v. Logan Furniture Mart, Inc.*, the Seventh Circuit recognized the due process and fairness concerns if "crushing damages" are imposed.¹²¹ These images of a *fatal financial blow* to a business

¹¹⁶ "Imminent insolvency" is defined in *Ballentine's Law Dictionary* as "[i]nsolvency likely to occur at any moment." BALLENTINE'S LAW DICTIONARY 583 (3d ed. 1969) (citing *Arnold v. Globe Exch. Bank*, 40 F.2d 955 (E.D.N.Y. 1930)).

¹¹⁷ U.C.C. § 1-201(23) (2001).

¹¹⁸ 11 U.S.C. § 101(32)(A) (2006).

¹¹⁹ *Merriam-Webster's Dictionary* defines "imminent" as "ready to take place; especially: hanging threateningly over one's head." *Imminent Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/imminent> (last visited Apr. 7, 2012). "Imminent" carries a similar legal meaning. For example, *Black's Law Dictionary* defines "imminent danger" as "[a]n immediate, real threat." BLACK'S LAW DICTIONARY 450 (9th ed. 2010).

¹²⁰ 232 F.R.D. 295, 304 (N.D. Ill. 2005).

¹²¹ 503 F.2d 1161, 1164 (7th Cir. 1974) ("[P]rocedural fairness with respect to protecting defendants from crushing damages predicated on the statutory minimum recovery is an important consideration in determining the superiority of the class action . . .").

and a damages award that would *crush* a business implicate the notion of insolvency or a serious risk of insolvency.

Defining a standard under which aggregated statutory damages are improper avoids the problems associated with a bright-line rule, such as: class actions for statutory damages are not superior when the potential damages would bankrupt the defendant. A bright-line rule, although easier and often more efficient for a judge to apply,¹²² may be subject to abuse as a benchmark of how many plaintiffs could be included in a class without risking failure of the superior requirement due to annihilative liability. Also, this benchmark may prevent certain classes from suing, which would notify the defendant of its noncompliance with FACTA, because any class action certainly causes some fear of “imminent insolvency” given the addition and amplification effect. A standard or a “flexible rule” stresses fairness, allowing the court to determine when the size of a potential class damages award actually threatens a particular defendant’s business.¹²³

Defining the annihilative standard in the context of “imminent insolvency” allows judges to prevent the most extreme results, without altogether doing away with class actions in suits claiming statutory damages. Congress did not intend for courts to blindly refuse to certify a class seeking statutory rather than actual damages. Had it intended such blanket denial, Congress would have prohibited class actions seeking statutory damages under TILA instead of imposing a cap.¹²⁴ Nonetheless, it is still important to consider the effect the damages will have on a defendant when there is a “real possibility” that it will not survive such liability.¹²⁵

¹²² Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 MONT. L. REV. 59, 72 (2001) (discussing the tension between bright-line and flexible rules).

¹²³ See *id.* A flexible rule allows a court to “take into account the individual circumstances of each case.” *Id.*

¹²⁴ See 15 U.S.C. § 1640(a)(2)(B) (2006).

¹²⁵ Payne, *supra* note 115, at 1231 (“To the extent that a court may consider a lender’s financial status in certifying TILA-rescission classes, the court should limit such a defense to those lenders for whom insolvency is a real possibility.”).

B. Solving the Problems Posed by Annihilative Statutory Damages

1. Staying True to the Purpose of Rule 23 and Congressional Intent

The intent of the authors of Rule 23—that the rule be applied with wide discretion by trial judges—supports a finding that a class action fails the superiority requirement when the aggregated statutory damages would impose ruinous liability on a defendant for a violation that caused little or no actual harm to the plaintiffs.

The authors of Rule 23 included subsection (b)(3) to make class actions available when “convenient and desirable” in cases “in which a class action would achieve economies of time, effort, and expense . . . without sacrificing procedural fairness or bringing about other undesirable results.”¹²⁶ Courts have interpreted Rule 23 as providing trial judges with wide discretion in deciding whether a class action is the appropriate method for adjudication in light of what would be practical under the circumstances.¹²⁷ Rule 23 was intended to provide the trial court with the authority to “employ realism and good sense in denying class action status.”¹²⁸ Classes certified under Rule 23(b)(3) are only meant to proceed if the trial judge determines, through discretion and good sense, that a class is the “fairest, most efficient, and . . . the most just way” of resolving the conflict.¹²⁹ Therefore, if a judge determines that a class action is not practical because the aggregated statutory damages could financially destroy a business, it is within his discretion—and the purpose of Rule 23—to refuse to certify that class.

¹²⁶ FED. R. CIV. P. 23 advisory committee's note (citing ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* 201 (1950)).

¹²⁷ See *Ratner v. Chem. Bank N.Y. Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972) (“Students of the Rule have been led generally to recognize that its broad and open-ended terms call for the exercise of some considerable discretion of a pragmatic nature.”); see also *Wilcox v. Commerce Bank of Kan. City*, 474 F.2d 336, 346 (10th Cir. 1973) (“[T]he Rule requires the weighing of one reason against another or against consideration of common sense and practicality.”); Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 39 (1967) (“[Rule 23] confides to the district judges a broad range of discretion.” (citations omitted)).

¹²⁸ *Wilcox*, 474 F.2d at 347.

¹²⁹ Frankel, *supra* note 127, at 43.

There is little record of the congressional intent underlying the statutory damages provision of the FCRA.¹³⁰ But, one can infer Congress's purpose in providing statutory damages for FACTA violations from the legislative history of the similar damages provision in TILA. Congress amended TILA in 1974, capping aggregated statutory damages resulting from a class suit at what is now the "lesser of \$500,000 or 1 per centum of the net worth of the creditor."¹³¹ The Senate committee responsible for the amendment recognized that the original deterrence purpose of statutory damages still held true: "to provide creditors with a meaningful incentive to comply with the law."¹³² They also noted, however, that deterrence could be achieved "without subjecting creditors to enormous penalties for violations which do not involve actual damages and may be of a technical nature."¹³³ The legislature chose to cap the aggregated damages under TILA in order to preserve the "deterrent effect" of bringing claims for statutory damages in a class action suit while "protect[ing] small business firms from catastrophic judgments."¹³⁴ In light of the commentary surrounding the TILA cap, it is rational to infer that Congress did not intend violations of the statutory damages provisions of these consumer protection laws to effectively ruin businesses. Similarly, the objective of FACTA truncation—protecting consumers from vulnerability to identity theft—can be achieved without subjecting businesses to bankruptcy if judges certify only those FACTA classes that are superior and will not result in annihilatory liability.

The Ninth Circuit has opined that by not capping aggregated damages under FACTA, limiting the number of persons that could be certified in a class, or explicitly providing for awards below the statutory minimum damages, Congress intended for there not to be any other barriers or limits to consumers bringing their FACTA claims as class actions.¹³⁵ The court reasoned that because there was already discord in the district courts over whether it was

¹³⁰ See 15 U.S.C. § 1692 (2006).

¹³¹ 15 U.S.C. § 1640a(2)(B) (2006).

¹³² S. REP. NO. 93-278, at 14 (1973).

¹³³ *Id.*

¹³⁴ Scheuerman, *supra* note 13, at 145-46 (quoting H.R. REP. NO. 93-1429 (1974) (Conf. Rep.), reprinted in 1974 U.S.C.C.A.N. 6148, 6153).

¹³⁵ *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 718 (9th Cir. 2010).

proper to assess the deleterious effect of the damages on the defendant at the certification stage, Congress must have been aware of the issue at the time they amended FACTA with the Credit and Debit Card Receipt Clarification Act of 2007.¹³⁶ Furthermore, because Congress was aware of the split and amended the act but did nothing to resolve the issue, Congress must not have been "sufficiently concerned about disproportionate damages as a result of class actions."¹³⁷ Based on the lack of congressional action, the Ninth Circuit determined that "limit[ing] class availability merely on the basis of *enormous* potential liability . . . would subvert congressional intent."¹³⁸

Congressional inaction differs from congressional action, and the former is not necessarily evidence of congressional intent. The Ninth Circuit in *Bateman* did not consider the possibility that Congress declined to cap the aggregated FACTA damages in order to see how judicial opinions on issues such as the due process implications of enormous aggregated statutory damages develop in the courts. Further, Congress's failure to impose an express limit does not necessarily mean that Congress intended the courts to refrain from establishing a common law limit on the statutory penalty levied against one defendant in a single suit. Thus, a constitutional issue still remains requiring a resolution—the effect of these enormous and disproportionate statutory awards on a defendant's due process rights.¹³⁹

2. Avoiding the Due Process Issue

Some judges have ruled that due process issues are not proper to consider at the certification stage and should be addressed in post-trial hearings where the damage award can be reduced if necessary.¹⁴⁰ For four reasons, judges should avoid the

¹³⁶ *Id.* at 712, 720 (citing Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565 (2008)).

¹³⁷ *Id.* at 720 ("Had Congress been sufficiently concerned about disproportionate damages as a result of class actions, it would have limited class availability or aggregate damages.").

¹³⁸ *Id.* at 723 (emphasis added) (internal quotation marks omitted).

¹³⁹ See the due process problem explored *supra* in Part I.B.

¹⁴⁰ In *Parker*, the Second Circuit recognized the potential due process concerns raised by combining the class action with statutory damages but stated that, if the Due Process Clause is invoked, it should not be to "prevent certification, but to nullify that

due process issue altogether by considering the potential size of the damage award at the certification stage: (1) if the defendant is found liable, a massively aggregated statutory award will certainly be found unconstitutional; (2) consideration at the certification stage will give effect to the avoidance doctrine; (3) settlement pressure dooms the "wait-and-see" approach; and (4) judicial remittitur below the per-consumer statutory minimum violates the language of the statute.

a. Massively Aggregated Statutory Awards Certainly Will Be Found Unconstitutional

Imposing annihilative aggregated statutory damages when there has been little or no actual harm violates the due process rights of defendants. Many judges have expressed such concerns, and these concerns withstand scrutiny under factors typically applied to assess the constitutionality of punitive damages: the defendant's ability to pay, the reprehensibility of defendant's conduct, and the ratio of compensatory damages to punitive damages.¹⁴¹ Assuming the 46,000-member class in *Leysoto* were certified and each plaintiff awarded the minimum statutory damages of \$100, the company would have faced an aggregated statutory damages award of \$4.6 million.¹⁴²

effect and reduce the aggregate damage award." *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (citations omitted). In *Murray*, the Seventh Circuit ruled that "constitutional limits are best applied after a class has been certified." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006). In his concurring opinion in *Parker*, Judge Newman offered a similar alternative to reducing the statutory damage award. 331 F.3d at 27 (Newman, J., concurring). He advocated avoiding due process concerns by certifying the class "only up to some reasonable aggregate amount of damages" resulting in an award of "substantially less" than the statutory minimum. *Id.* at 27-28.

¹⁴¹ In *Gore*, the Supreme Court held that in determining whether punitive damages are "grossly excessive" courts should look to (1) "the degree of reprehensibility of the defendant's conduct"; (2) "[the] ratio [of the punitive damage award] to the actual harm inflicted on the plaintiff"; and (3) a comparison of "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-84 (1996).

¹⁴² See *Leysoto v. Mama Mia I., Inc.*, 255 F.R.D. 693 (S.D. Fla. 2009).

i. Defendant's Ability to Pay

Mama Mia's potential statutory penalty—between \$4.6 and \$46 million—seems particularly excessive when viewed in light of the corporation's net assets of approximately \$40,000.¹⁴³ Courts have ruled that judges may properly consider a defendant's ability to pay in assessing whether punitive damages are grossly excessive.¹⁴⁴ Despite *Gore's* prohibition on upholding otherwise unconstitutional punitive damages because of the defendant's wealth, the Tenth Circuit stated in *Continental Trend Resources, Inc. v. OXY USA, Inc.* that *Gore* should not be interpreted to mean that the defendant's ability to pay is "irrelevant."¹⁴⁵ Other courts have held that judges should consider the defendant's ability to pay or financial situation in assessing punitive damages because punitive damages are meant to deter, which is not furthered by the imposition of a penalty the defendant could not possibly pay.¹⁴⁶

Statutory damages are also meant to punish the defendant and deter future violations, and there is no value in imposing a statutory punishment that a defendant cannot possibly pay. Therefore, judges should consider a defendant's ability to pay when reviewing whether or not aggregate statutory damages are unconstitutionally excessive. Mama Mia's glaring inability to pay even a fraction of the minimum \$4.6 million award certainly

¹⁴³ *Id.* at 697.

¹⁴⁴ A court, however, should not impose an otherwise unconstitutionally excessive award of punitive damages on a defendant simply because said defendant is wealthy.

¹⁴⁵ 101 F.3d 634, 641 (10th Cir. 1996); *see also Gore*, 517 U.S. at 585. A defendant's ability to pay should be considered when reviewing punitive damages because "\$50,000 may be awesome punishment for an impecunious individual defendant but wholly insufficient to influence the behavior of a prosperous corporation." *Cont'l Trends*, 101 F.3d at 641.

¹⁴⁶ *Lee v. Edwards*, 101 F.3d 805, 813 (2d Cir. 1996) ("We recognize that one purpose of punitive damages is deterrence, and that deterrence is directly related to what people can afford to pay." (citing *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992))). For example, in *Myers v. Central Florida Investments, Inc.*, the Eleventh Circuit applying Florida law held that because the purpose of punitive damages is to "punish the defendant for its wrongful conduct and to deter similar misconduct," a judge may properly consider the wealth of the defendant when "determining the reasonableness of a punitive award." 592 F.3d 1201, 1216 (11th Cir. 2010) (citation omitted) (internal quotation marks omitted). Additionally, the punitive damage award should "not result in economic castigation or bankruptcy of the defendant." *Id.* (citations omitted) (internal quotation marks omitted).

weighs in favor of finding that such an award would be grossly excessive and unreasonable.

ii. Reprehensibility of Conduct

In order to assess the reprehensibility of Mama Mia's conduct—knowingly failing to remove credit and debit card numbers from approximately 46,000 receipts—it is helpful to compare the conduct to the reprehensibility factors set out in *Gore* and *Campbell*. These reprehensibility factors include whether:

[T]he harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.¹⁴⁷

At most, Mama Mia's FACTA violation caused some unquantifiable emotional harm due to the fear of identity theft. No plaintiff alleged any actual economic loss and it would require a great stretch of the imagination to contemplate any physical harm that could possibly result from the failure to properly truncate. Nor can it be said that the FACTA violation at issue demonstrated any "indifference to or a reckless disregard of the health or safety of others," or targeted a vulnerable population.¹⁴⁸ Although the defendant's conduct did involve repeated acts, to recover statutory damages for these violations the defendant must have at least acted in reckless disregard.¹⁴⁹ Mama Mia's conduct,

¹⁴⁷ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (citing *Gore*, 517 U.S. at 576–77).

¹⁴⁸ *Id.*

¹⁴⁹ Title 15 U.S.C. § 1681n(a) (2006) requires that in order to recover statutory damages, the defendant must have "willfully fail[ed] to comply." A defendant who recklessly violates the statute, however, could meet this willful noncompliance standard. The Supreme Court interpreted the willfulness requirement for statutory damages under section 1681n to encompass "not only knowing violations of a standard, but reckless ones as well." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007) (citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132–33 (1988)). In *Murray v. New Cingular Wireless*, the Seventh Circuit read recklessness to mean something "more than negligence but less than knowledge of the law's requirements." *Murray v. New*

knowingly or recklessly printing noncompliant receipts, fits somewhere between "mere accident" and intentional conduct.¹⁵⁰ Although the defendant's conduct is not entirely blameless, the FACTA violations do not seem reprehensible in the traditional sense—there has been no physical harm, harm to a vulnerable population, or intentional deceit. At its worst, Mama Mia's behavior evidences a disregard for, or failure to become aware of, a statutory regulation intended to protect individuals from financial harm.

iii. Ratio of Compensatory Damages to Punitive Damages

One must also compare the portion of the statutory damages award that is meant to compensate the plaintiffs with the portion of the award that is punitive. In other words, the size of the damage award is compared to the actual or potential harm suffered by the plaintiff class as a result of Mama Mia's FACTA violation.¹⁵¹ The potential harm caused by a violation of FACTA's truncation requirement is any risk of future identity theft due to the inclusion of card numbers on the receipt. These harms, however, are difficult to assess in statutory damages cases precisely because statutory damages are sought *instead of* actual damages and there are no allegations of actual or quantifiable harm suffered as a result of the violation. Thus, the compensatory function of the aggregated statutory damage award is effectively zero.

Although the defendant had violated the statute approximately 46,000 times, no plaintiff alleged they suffered any harm, which means there is zero harm for the statutory damages to compensate. Forty-six thousand multiplied by zero is still zero.¹⁵² Even if a "higher ratio may be justified in cases in which

Cingular Wireless Servs., Inc., 523 F.3d 719, 726 (7th Cir. 2006) (citing *Safeco*, 551 U.S. 47).

¹⁵⁰ See *infra* note 159.

¹⁵¹ See Barker, *supra* note 25, at 539. ("The second guidepost in the determination of gross excessiveness is the ratio of the punitive damage award to the actual or potential harm inflicted on the plaintiff.").

¹⁵² In his application of the *Gore* guideposts to statutory damages recovered under copyright infringement laws, J. Cam Barker assessed the actual harm of file sharing as the actual cost of a musical album that might have been spent had it not been illegally downloaded. *Id.* at 548. Therefore, Barker concluded that approximately \$735 of the

the injury is hard to detect" or the harm is largely noneconomic, the ratio of 4.6 million punitive to zero compensatory damages is certainly excessive.¹⁵³

iv. All Signs Point to a Due Process Violation

Because the defendant's net assets were a mere \$40,000, its conduct did not seem reprehensible in the traditional sense, and the ratio of punitive to compensatory effect was poor, any judge should find this statutory damage award of \$4.6 million grossly excessive when imposed for a violation that caused no quantifiable harm.¹⁵⁴ Under similar circumstances, if such an annihilative statutory damage award were handed down, it would likely be unconstitutional in light of the defendant's inability to pay and the extreme disproportionality between the compensatory and punitive function effectively served by the damages.

b. Making Class Certification Rulings in Light of the Constitutional Avoidance Doctrine

Avoiding the due process issue by considering annihilative liability at the certification stage allows the court to adjudicate the matter without having to resolve a constitutional issue. In advocating for consideration of annihilative damages in the context of Rule 23(b)(3), Judge Wilkinson relied on the avoidance doctrine and Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority*.¹⁵⁵ Under the doctrine of constitutional avoidance, the Supreme Court generally will not decide a case based on a constitutional issue if non-constitutional

\$750 statutory damage amount served a punitive rather than compensatory function. *Id.*

¹⁵³ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996). The court noted that although there is no ratio that will always be unconstitutional, "[w]hen the ratio is a breathtaking 500 to 1 . . . the award must surely 'raise a suspicious judicial eyebrow.'" *Id.* at 583 (quoting *TXO Prod. Corp., v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)).

¹⁵⁴ This assessment differs from an assessment of individual action brought under FACTA, in which the ratio of punitive damages to actual harm (assuming no actual harm were alleged) would be somewhere between 100 to 0 and 1000 to 0.

¹⁵⁵ *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 278 (4th Cir. 2010) (Wilkinson, J., concurring); see *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

grounds for adjudication exist.¹⁵⁶ In the realm of statutory interpretation, constitutional avoidance is based on the presumption that Congress enacts legislation that is aligned with the protection of fundamental constitutional liberties when those liberties are implicated by that legislation.¹⁵⁷ Although the doctrine of constitutional avoidance was applied by judges long before Justice Brandeis took the bench, he is typically credited for this canon as laid out in his concurrence in *Ashwander*.¹⁵⁸ The doctrine is not limited in application to the Supreme Court. Lower courts often use the doctrine of constitutional avoidance and decide cases on any proper grounds other than the constitutional questions presented.¹⁵⁹ Under this precedent, all federal courts should make every effort to adjudicate a case on any legitimate non-constitutional grounds before addressing the constitutional questions underlying the case. Ruling that a class is not superior under Rule 23 because it would create enormous liability, rather than addressing the constitutionality of the aggregate award after trial, demonstrates avoidance "in the best tradition of the Brandeis concurrence."¹⁶⁰

¹⁵⁶ *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984) ("It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose the case." (citing *Ashwander*, 297 U.S. at 347)).

¹⁵⁷ *Regan v. Time, Inc.*, 468 U.S. 641, 696 (1984) (Stevens, J., concurring in part and dissenting in part).

¹⁵⁸ Before becoming Chief Justice of the Supreme Court, John Marshall adhered to the principle of only deciding a constitutional issue when it was "indispensably necessary to the case." *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558). If the case could be decided on grounds other than the constitutional ones, "a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed." *Id.* In his concurrence, Justice Brandeis laid out several rules of decision developed by the Supreme Court to avoid "passing upon a large part of all the constitutional questions pressed upon it." *Ashwander*, 297 U.S. at 347. Among these rules: "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Id.* Justice Brandeis's *Ashwander* concurrence has been referred to as "one of the most respected opinions ever written by a Member of [the] Court." *Delaware v. Van Arsdall*, 475 U.S. 673, 693 (1986) (Stevens, J., dissenting).

¹⁵⁹ See, e.g., *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 730-31 (9th Cir. 2003); *Adams v. City of Battle Creek*, 250 F.3d 980, 986 (6th Cir. 2001); *United States v. Taveras*, 133 F. Supp. 2d 298, 307 (S.D.N.Y. 2001).

¹⁶⁰ *Stillmoch*, 385 F. App'x at 278.

c. Settlement Pressure Dooms the "Wait-and-See" Approach

If courts apply the "wait-and-see" approach to due process issues raised by enormous aggregate damages, then the defendant's due process rights might go unaddressed were it to fold to the pressure of the enormous liability of the certified class and agree to a large settlement.¹⁶¹ When the defendant settles a claim under pressure from the certification of the class, neither the decision to certify such a class nor the size of the settlement agreement will be reviewed on appeal.¹⁶² Therefore, if courts participate in the "quintessential judicial punt" and decline to address the size of the potential aggregate award and its bearing on due process, they risk that the defendant will settle before the issue can be addressed.¹⁶³

d. Judicial Remittitur Below the Per-Consumer Statutory Minimum Violates the Language of the Statute

If judges choose to wait and address the due process implications after the verdict has been entered and an aggregate award handed down, the remedy is likely to be a judicial reduction in the award. This remittitur may require the judge to reduce per-consumer awards below the statutory minimum, therefore violating the plain meaning of the statute. As Judge Newman points out in his *Parker* concurrence: "[C]onstru[ing] [the statute] to authorize an award of substantially less than [the statutory minimum] to all but the initially named plaintiffs . . . cannot be reconciled with the terms of the statute . . ."¹⁶⁴

¹⁶¹ Chaplin, *supra* note 16, at 332 ("[The] wait-and-see attitude has substantial potential consequences, chief of which is the concern with wringing an unfair settlement from a merchant justifiably concerned with unknown liability and the uncertainty of the litigation process.").

¹⁶² See Scheuerman, *supra* note 13, at 103-04, 148-50; *supra* Part I.C.

¹⁶³ Scheuerman, *supra* note 13, at 104 ("[D]eclining to consider any due process limit until after the class has been certified and a verdict entered. . . [typically] means that the court will never reach the due process issue.").

¹⁶⁴ *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 27 (2d Cir. 2003) (Newman, J., concurring).

3. Preempting Settlement Pressure

Application of the imminent insolvency standard will also relieve the possibility of blackmail settlements in the more extreme FACTA cases. Courts that refuse to certify annihilative classes shield the defendant from facing the most extreme form of settlement pressure—settle or risk bankruptcy. Excessively large classes seeking statutory damages function as a type of *judicial blackmail* the moment they are certified.¹⁶⁵ Although Rule 23(f) allows interlocutory appeals concerning certification, the risk is still present that a defendant will find it too costly to pursue and instead settle.¹⁶⁶ Furthermore, if the courts decide that it is not proper to consider the size of the potential damages award at the certification stage, an interlocutory appeal of the class certification decision would not be helpful anyway. Barring plaintiffs from aggregating these statutory claims negates the threat of unfair settlements, instead leaving plaintiffs to bring individual claims that defendants may decide to settle or litigate based only on the validity of their defense and not the coercion of judicial blackmail.

4. Consideration of the Size of Potential Liability Does Not Constitute a Decision on the Merits in Violation of *Eisen v.* *Carlisle & Jacquelin*

Although considering the size of potential liability requires a prospective assessment of the damages that would be awarded if the class were to succeed on the merits, it does not involve an impermissible decision on the merits. In the 1974 decision *Eisen v. Carlisle & Jacquelin*, the Supreme Court held that “nothing in either the language or history of Rule 23 [] gives a court any

¹⁶⁵ Lauchheimer, *supra* note 38, at 551. In *Coopers & Lybrand v. Livesay*, the Supreme Court stated that “certification of a large class may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.” 437 U.S. 463, 476 (1978). Such large classes, however, can be a “double-edged sword” for plaintiffs, because a defense victory on the merits is a *res judicata* bar against subsequent individual suits by the class members. Lauchheimer, *supra* note 38, at 551.

¹⁶⁶ Settling rather than risking their business in litigation, is potentially a poor compromise for both parties. It is possible it will also harm the members of the class because the blackmail settlement, while costly for the defendant, may actually pay each individual plaintiff less than the statutory minimum.

authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”¹⁶⁷ But, the distinction between class certification discovery and merits discovery is fuzzy; and circuit and district courts have interpreted the Court’s ruling to allow the examination of evidence necessary to assess Rule 23 factors, such as the possible size of recovery and the effect it will likely have on a defendant.¹⁶⁸ For example, the Third Circuit has interpreted the *Eisen* decision as consistent with the practice of commanding evidentiary discovery necessary to assess the factors of Rule 23 at the certification stage:

An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a

¹⁶⁷ 417 U.S. 156, 177 (1974); see 2 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4:44 (4th ed. 2002); Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 332–41 (2011). On remand from *Eisen*’s first trip to the Second Circuit, the trial judge conducted small pre-certification-hearing hearings at which much evidence was presented on who should bear what percentage of the cost of providing notice to all potential class members. Marcus, *supra*, at 335–36. The Supreme Court eventually ruled that delving into the substantive merits of a claim at the certification stage violates Rule 23’s command that a decision on class certification be made “[a]s soon as practicable after the commencement of [the] action . . .” *Eisen*, 417 U.S. at 178 (alterations in original) (internal quotation marks omitted). The amended version of the Rule now states: “At an early practicable time . . . the court must determine by order whether to certify the action as a class action.” FED. R. CIV. P. 23(c)(1)(A).

¹⁶⁸ See Marcus, *supra* note 167, at 340–41. Marcus further argues:

[T]here was abundant opportunity to dispute the dividing line between “merits” discovery and “class” discovery. As the Fifth Circuit put it in an en banc 1973 case, “[i]t is inescapable that in some cases there will be overlap between the demands of [Rule] 23(a) and (b) and the question of whether [a] plaintiff can succeed on the merits. . . .”

The Supreme Court itself recognized in 1978 that “the class determination generally involves considerations that are ‘enmeshed in the factual and legal issues comprising the plaintiffs’ cause of action.’”

Id. at 340–41 (brackets in original) (quoting *Coopers*, 437 U.S. at 469; *Huff v. N.D. Cass Co. of Ala.*, 485 F.2d 710, 714 (5th Cir. 1973)). The Second and Seventh Circuits have ruled that “evidentiary inquiries” or “findings” on a mixed issue of law and fact” are often necessary to rule on class certification and are not prohibited by the Supreme Court’s ruling in *Eisen*. Marcus, *supra* note 167, at 350–51 (citing *In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 40–41 (2d Cir. 2006); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001)).

class certification requirement is met. . . . *Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement.¹⁶⁹

Similarly, district courts in the Eleventh Circuit have held that because it is often necessary to "touch[] on the merits of the litigation" in order to make the required findings under Rule 23, it is within the trial court's discretion to do so at the certification stage to the extent necessary to determine whether a class should be certified according to Rule 23.¹⁷⁰

The annihilative standard argument advocates assessing the size of the potential aggregated damages award (and the likely effect on the defendant) as a superiority factor under Rule 23(b)(3). Thus, any examination of the merits of the case for this assessment is necessary for a thorough and accurate determination of whether the class should be certified. Under the principle set forth by the Third Circuit, and echoed by district courts in the Eleventh Circuit, *Eisen* does not forbid such an inquiry.

C. Policy of Preventing Annihilation

It is a dangerous policy to allow plaintiffs to financially cripple a defendant with the justice system in the absence of actual harm simply to enforce a statute. Such a harsh penalty without an actual injury "offends fundamental notions of fairness," and the economic costs outweigh any benefit of deterrence or compensation.¹⁷¹

¹⁶⁹ *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316–17 (3d Cir. 2008) (citing *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166–69 (3d Cir. 2001)); see *Marcus*, *supra* note 167, at 351–54.

¹⁷⁰ See *Campos v. Choicepoint, Inc.*, 237 F.R.D. 478, 484 (N.D. Ga. 2006) (quoting *Cooper v. S. Co.*, 390 F.3d 695, 712 (11th Cir. 2004) (internal quotation marks omitted) ("[I]t [is] impossible to meaningfully address the Rule 23 criteria without at least touching on the 'merits' of the litigation." (quoting *Cooper*, 390 F.3d at 712) (internal quotation marks omitted)); see also *Leysoto v. Mama Mia I., Inc.*, 255 F.R.D. 693, 696 (S.D. Fla. 2009) ("[I]t is within a court's discretion to consider the merits of the claims in order to determine whether the requirements of Rule 23 are satisfied." (citations omitted)).

¹⁷¹ *Chaplin*, *supra* note 16, at 312 ("It offends fundamental notions of fairness when litigants, without actual injury (and without the prospect of actual injury), are allowed to use the courts as a means of financial gain.").

First, the combination of class action adjudication and a statutory damages provision creates a "draconian outcome" that subverts the policy goal of fairness.¹⁷² This is especially the case when the combination results in the destructive punishment of a company for statutory violations that caused little or no quantifiable harm. It is unfair to impose a larger penalty than is necessary to accomplish the purposes of statutory damages—compensation, retribution, and deterrence.

Similarly, in criminal sentencing, a judge should impose a sentence or penalty that is only as severe as is necessary.¹⁷³ A criminal sentence performs several policy functions: prevention, deterrence, rehabilitation, and retribution.¹⁷⁴ In handing down a punishment, courts consider these goals and impose only the sentence that is necessary, for example, to deter future conduct, rehabilitate the wrongdoer, and punish the wrongdoer for the conduct.¹⁷⁵ To accomplish the retributive function of a penalty, courts should "impose the minimum sentence that is consistent with . . . the gravity of the offense."¹⁷⁶ In keeping with the principle of the minimum necessary sentence, the United States Sentencing Guidelines provide for an annihilatory penalty—the so-called *corporate death penalty*—only against the worst bad actors: corporations falling into the classification of "criminal purpose organizations."¹⁷⁷

Punitive and statutory damages meant to punish and deter statutory violations can be classified as quasi-criminal remedies

¹⁷² Note, *Class Actions Under the Truth in Lending Act*, 83 YALE L.J. 1410, 1415 (1974) (citing Richard F. Dole, Jr., *Private Enforcement of Consumer Credit Legislation*, 26 BUS. LAW 915, 918 (1971)). In this 1974 Note for the *Yale Law Journal*, the author observed that the "annihilating" punishment" TILA would impose on the defendant in *Ratner* if decided as a class action—\$13 million despite no allegations of actual damages—resulted in a "draconian outcome." *Id.* (citing *Dole, supra*, at 918).

¹⁷³ 24 C.J.S. *Criminal Law* § 1997 (2006).

¹⁷⁴ *Id.* § 1997, at 23.

¹⁷⁵ *Id.* § 1997, at 25 ("The court must impose a sentence sufficient, but not greater than necessary, to comply with these purposes." (citations omitted)).

¹⁷⁶ *Id.* § 1997, at 23 (citations omitted).

¹⁷⁷ Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 939–40 (2005) (internal quotation marks omitted) ("For the 'worst' offenders, defined by the United States Sentencing Guidelines as 'criminal purpose organizations,' the Guidelines provide for fines that divest the corporation of all its net assets." (footnotes omitted)).

that "blend the criminal law function of punishment and deterrence with the tort law goal of reparation."¹⁷⁸ As such, courts should mirror the analysis employed in criminal sentencing and consider a punishment's purposes and limitations when handing down civil penalties in the form of punitive damages or aggregated statutory damages. Imposing a destructive statutory penalty when the underlying violation caused little actual harm violates the retributive concept that a punishment should fit the crime, a policy deeply rooted in the idea of fairness. At least one district court judge assessing superiority has recognized that aggregating statutory damages claims in a class action fails this policy. In *Anderson v. Capital One Bank*, the trial judge noted that there was "more than an element of unfairness in subjecting a defendant to a suit by a class of 19,840 persons theoretically eligible for awards of \$100 to \$1000."¹⁷⁹ Such class actions, which ring *unfair* because of their potential impact on defendants, should not be certified as superior under Rule 23(b)(3).

Second, the economic costs posed by certifying these classes outweigh any benefit of increasing incentives for individuals to bring FACTA claims. Aggregating claims for statutory damages in a class action serves as a deterrent—a central policy goal of the statute—but in reality this deterrent effect is small.¹⁸⁰ The Seventh Circuit in *Murray* observed that "society may gain from the deterrent effect of financial awards" if a Rule 23(b)(3) class is certified in situations in which "the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate."¹⁸¹ The deterrent effect of aggregation, however, is

¹⁷⁸ Thomas Koenig & Michael Rustad, "CrimTorts" as Corporate Just Deserts, 31 U. MICH. J.L. REFORM 289, 293 (1998).

¹⁷⁹ 224 F.R.D. 444, 452–53 (W.D. Wis. 2004). The judge in *Anderson* found these potential damages provided by the statutory damages provision of the FCRA so unfair because they were "wholly out of proportion to the harm done to any of the class members or to all of them together" by the alleged violations of the Equal Credit Opportunity Act. *Id.* at 453.

¹⁸⁰ It might initially seem as if this central policy benefit is the exact purpose for which class actions were created: access to the courts, and loss compensation, to those for whom it would not otherwise be financially feasible. But, in most claims for statutory damages (and in FACTA claims in particular) members of the putative class have not experienced actual harm and so are not terribly concerned with compensation.

¹⁸¹ *Murray v. GMAC Morg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (citing *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344–45 (7th Cir. 1997)).

minor when one reflects on the immediacy with which businesses typically become FACTA compliant after complaints are filed, the existence of other incentives to bring individual suits, and the availability of alternative enforcement by the Federal Trade Commission.

Observing that the defendant in *Leysoto* complied with FACTA within two months of the plaintiff filing his individual complaint, the trial judge stated that aggregation of FACTA claims is "simply unnecessary to effectively enforce the Act and compensate victims of identity theft."¹⁸² The facts of *Price v. Lucky Strike Entertainment, Inc.* are even more persuasive on this ground.¹⁸³ In *Price*, the defendant began removing the expiration date from its receipts "promptly" after learning of the FACTA violation, and became completely FACTA-compliant within only four days.¹⁸⁴ This immediate response to comply after notification of an *individual* plaintiff's complaint "nullif[ies] any specific deterrence benefit that might have derived from class certification."¹⁸⁵

Furthermore, the incentives to bring individual actions for FACTA violations ensure that individual claims are a viable alternative, relieving "concerns that Defendants would avoid accountability in the absence of class certification."¹⁸⁶ These incentives render successful suits "essentially costless" for plaintiffs.¹⁸⁷ Finally, the Federal Trade Commission has the power to enforce FACTA, imposing penalties on companies that

¹⁸² *Leysoto v. Mama Mia I., Inc.*, 255 F.R.D. 693, 699 (S.D. Fla. 2009).

¹⁸³ *Price v. Lucky Strike Entm't*, No. CV 07-960-ODW (MANx), 2007 WL 4812281 (C.D. Cal. Aug. 31, 2007).

¹⁸⁴ *Id.* at *5.

¹⁸⁵ *Id.* (citing *Abels v. JBC Legal Grp., P.C.*, 227 F.R.D. 189, 195 (N.D. Cal. 2005)).

¹⁸⁶ *Id.* at *6 (citing 15 U.S.C. § 1681n (2006)). Here the court reiterated that "section 1681n provides attorneys' fees [as well as reasonable costs] for successful litigants, ensuring that individual actions by consumers are viable." *Id.* Similarly, in *Stillmock* Judge Wilkinson recognized "no shortage of incentives for consumers to bring individual suits under FACTA," which provides "both costs and reasonable attorney's fees 'in the case of any successful action.'" *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 282 (4th Cir. 2010) (Wilkinson, J., concurring) (quoting §§ 1681n(a)(3), 1681o(a)(2)); see also *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 449 (6th Cir. 2002) ("ECOA's provision for the award of attorney's fees and costs to successful plaintiffs eliminates any potential financial bar to pursuing individual claims.").

¹⁸⁷ *Stillmock*, 385 F. App'x at 282 (Wilkinson, J., concurring) (quoting *Anderson v. Capital One Bank*, 224 F.R.D. 444, 453 (W.D. Wis. 2004)).

violate the statute even if private plaintiffs fail to carry out the role of private attorneys general by bringing civil claims.¹⁸⁸ These alternative deterrence mechanisms demonstrate that the main benefit of certifying classes of FACTA claims—ensuring deterrence of future violations—is actually quite small.

The costs of these aggregated statutory recoveries outweigh the small benefit of deterrence and are particularly outrageous given the state of our economy. The overarching policy goal when examining litigation from an economic efficiency point of view is to “maintain a legal system that promotes competition and growth in the economy.”¹⁸⁹ Certifying class actions when the damages sought are guaranteed and threaten the defendant’s survival undercuts this general economic goal.

Judges should take into account the serious cost of job losses that often accompanies these massively aggregated damages.¹⁹⁰ Imposing such extreme liability on businesses may put them out of business, subsequently removing jobs from the market, contributing to unemployment, and negatively impacting the economy. The policy applied to corporations in the realm of criminal law is once again telling. The United States Department of Justice considers the possibility of lost jobs and the impact on innocent employees when deciding whether to bring criminal charges against a corporation.¹⁹¹ Similarly, courts should consider the economic impact to entire communities that might result from imposing annihilative liability on a corporation through a class action.

¹⁸⁸ Chaplin, *supra* note 16, at 338 (“[T]here are other federal enforcement alternatives, such as through the Federal Trade Commission.” (quoting *Blanco v. CEC Entm’t Concepts L.P.*, No. CV 07-0559 GPS (JWJx), 2008 WL 239658, at *2 (C.D. Cal. Jan. 10, 2008))).

¹⁸⁹ Margolis, *supra* note 122, at 79.

¹⁹⁰ In *Stillmock*, Judge Wilkinson refers to the combination of statutory damages and class actions as a real jobs killer, pointing out that if the class seeking \$1.4 billion to \$14 billion in damages were successful in proving liability, Weis Markets, Inc., worth \$900 million, would go under and approximately 17,600 individuals would lose their jobs. *Stillmock*, 385 F. App’x at 279–80.

¹⁹¹ Ramirez, *supra* note 177, at 971.

D. FACTA Enforcement Does Not Require Annihilative Damages

Although applying the imminent insolvency standard will deny certification to some massive classes, the FACTA regulations remain enforceable for three reasons: (1) plaintiffs and plaintiffs' attorneys will likely continue to file class action complaints for FACTA violations; (2) individual plaintiffs who experience actual damages due to improper truncation may seek compensation; and (3) the Federal Trade Commission retains the power to enforce the statute.

Even when the annihilative standard is adopted, it is reasonable to expect that plaintiffs will continue to file class actions seeking statutory damages for FACTA violations, just as plaintiffs continue to do so in TILA suits despite the limitations placed on such relief in the statute's 1974 amendment.¹⁹² When Congress capped the amount of class action damages available under TILA, it did so with the purpose of "striking an appropriate balance between the advantages of the class action as a vehicle of a private enforcement and the need of creditors to avoid financial ruin."¹⁹³ Congress did not, therefore, intend to bar plaintiffs from seeking relief through a combination of the TILA damages provisions and Rule 23's class action mechanisms. Nor has the cap resulted in TILA actions grinding to a halt. A quick search reveals that plaintiffs are still bringing actions for statutory damages under TILA regardless of the cap.¹⁹⁴ Similarly, plaintiffs will likely continue to file FACTA claims and seek Rule 23(b)(3) class certification when the aggregation of their FACTA

¹⁹² Massive aggregated statutory damages awards are no longer recoverable under TILA, which currently caps the aggregated award at "the lesser of \$500,000 or 1 per centum of the net worth of the [defendant]." 15 U.S.C. §1640(a)(2)(B) (2006); see *supra* note 111.

¹⁹³ *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 223 (4th Cir. 1978) (citing S. REP. NO. 93-278, at 14-15 (1973)).

¹⁹⁴ See *Capela v. J.G. Wentworth, LLC*, No. CV09-882 (SJF) (WDW), 2009 WL 3128003 (E.D.N.Y. Sept. 24, 2009); *Briscoe v. Deutsche Bank Nat'l Trust Co.*, No. 08 C 1279, 2008 WL 4852977 (N.D. Ill. Nov. 7, 2008); *Motley v. Homecomings Fin., LLC*, 557 F. Supp. 2d 1005 (D. Minn. 2008); *Veal v. Crown Auto Dealerships, Inc.*, No. 8:04-CV-323-T-27, 2006 WL 435693 (M.D. Fla. Feb. 21, 2006); *Myers v. First Tenn. Bank, N.A.*, No. Civ.A. 96-A-783-N, 2000 WL 351810 (M.D. Ala. Mar. 30, 2000).

claims would not be so large as to meet the annihilative liability standard.

Furthermore, FACTA claims for compensatory damages, in which the plaintiff has experienced and alleges actual harm resulting from the failure to truncate their card information, will be unaffected by adoption of an annihilative standard for class certification. This subset of FACTA cases is unaffected by this proposal principally because plaintiffs often bring these suits individually rather than in aggregation—perhaps in anticipation of the denial of certification because individual issues of damages predominate over common questions of law or fact.¹⁹⁵ Regardless, the annihilative standard proposed here is inapplicable to claims for actual damages brought in a FACTA class because judges should consider possible annihilation only when it would result from statutory, rather than actual, damages.

Finally, the concern that more egregious violators of FACTA will go unpunished due to the potential class in any suit for statutory damages exceeding the annihilative damages standard is unfounded. Their violations will still be addressed by the FTC, which has the power to take administrative actions against these misbehaving corporations. Section 1681s of the Consumer Credit Protection Act provides that violators of any of the federal consumer protection statutes, including FACTA, are subject to administrative enforcement by the FTC under the Federal Trade Commission Act.¹⁹⁶ Specifically, the FTC has the power to bring a civil action against any person or entity committing a knowing violation of a consumer protection act, such as FACTA or TILA, subjecting such violators to “a civil penalty of not more than \$2,500 per violation.”¹⁹⁷ This provision, however, still affords some protection for the defendant, requiring that courts “shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.”¹⁹⁸ Therefore, the

¹⁹⁵ Certification of a Rule 23(b)(3) class requires that “the questions of law or fact common to class members predominate over any questions affecting only individual members.” FED. R. CIV. P. 23(b)(3).

¹⁹⁶ 15 U.S.C. § 1681s (2006).

¹⁹⁷ § 1681s(a)(2)(A).

¹⁹⁸ § 1681s(a)(2)(B).

FTC has the authority to enforce these consumer protection laws, but not to the extent that enforcement jeopardizes the existence of the defendant in violation of the laws.

CONCLUSION

While we patiently wait for the day that Congress will cap the amount of aggregated statutory damages available in a class action for violations of FACTA, trial judges should use the wide discretion available under Rule 23(b)(3) to protect small businesses, large corporations, and entire industries from the risk of insolvency under FACTA when there is only negligible harm to the plaintiffs. Refusing to certify a FACTA class when statutory damages would expose the defendant to imminent insolvency is consistent with congressional intent underlying Rule 23, FACTA, and the applicable statutory damages provision. Furthermore, refusing to certify such a class relieves the judge of declaring the excessive statutory damages award unconstitutional, giving effect to the Supreme Court's tradition of constitutional avoidance. Finally, applying the annihilative standard of imminent insolvency at the certification stage allows judges to protect defendants from the most extreme form of settlement pressure—the threat of bankruptcy from an all-or-nothing judgment.

In applying the annihilative standard at the certification stage, judges should examine the potential impact on the defendant of the minimum statutory damages for that class size. This potential impact of the aggregated damages functions as a superiority factor that the judge should weigh under Rule 23(b)(3) in determining whether or not a class action is the superior method of adjudication in the particular case. Because courts have ruled that any inquiry necessary to determine whether or not certification is proper does not violate the Supreme Court's prohibition of inquiring into the merits of the case, forecasting the size of a possible award and comparing it to the defendant's net worth is part of a necessary weighing of the superiority factors under Rule 23(b)(3), and proper at the certification stage.

Judges can and should use their certification discretion to prevent the FACTA class action from becoming a jobs killer. The important role of deterring companies from continuing to violate

FACTA will be perpetuated by plaintiffs who take advantage of the incentives to sue for statutory damages, and plaintiffs who sue to recover actual damages suffered from identity theft resulting from an improperly truncated receipt. This solution will avoid the impractical result of costing defendants their corporations, and often innocent individuals their jobs, only to provide plaintiffs with a minimal recovery.

*Holly S. Hosford**

* J.D. Candidate, University of Mississippi School of Law, 2013. The author wishes to thank Professor Jack W. Nowlin for his guidance and critique during the development of this Comment.

IN DEFENSE OF SELF-DEFENSE: HELLER'S SECOND AMENDMENT IN SENSITIVE PLACES

INTRODUCTION.....	1988
I. <i>HELLER</i> AND SENSITIVE PLACES.....	1991
A. <i>Sensitive Places</i>	1991
1. The Struggle to Define Sensitive Places	1991
2. Traditional Acceptance of Place Restrictions.....	1993
B. <i>Self-Defense</i>	1994
C. <i>Broad Application of Heller</i>	1997
D. <i>The Duty to Protect</i>	1999
E. <i>The Necessity of General Licensing to Carry a Weapon</i>	2002
II. SENSITIVITY AND SECURITY: PLACES THAT MAY BE SENSITIVE.....	2003
A. <i>Government Buildings</i>	2003
1. Reasons for Sensitivity	2003
2. Government Provisions of Security	2004
B. <i>Public Schools</i>	2005
1. Reasons for Sensitivity	2005
2. Government Provisions of Security	2006
C. <i>Public Universities</i>	2006
1. Reasons for Sensitivity	2006
2. Government Provisions of Security	2007
D. <i>Places of Worship</i>	2007
1. Reasons for Sensitivity	2007
2. Government Provisions of Security	2008
III. TRADITIONAL ACCEPTANCE OF PLACE RESTRICTIONS REVISITED	2008
A. <i>Application of Due Process Principles to the Second Amendment</i>	2010
B. <i>Factors Indicating a Duty to Protect</i>	2011
IV. THREE-FACTOR ANALYSIS TO DETERMINE CONSTITUTIONALITY OF SENSITIVE PLACE HANDGUN PROHIBITIONS.....	2014
A. <i>Level of Scrutiny</i>	2015
B. <i>Factor One: Is the Place Sensitive?</i>	2017

<i>C. Factor Two: Is the Place Private or Public?</i>	2018
<i>D. Factor Three: Is Sufficient Security Provided?</i>	2019
<i>E. Determining Sufficiency</i>	2019
<i>F. Limits on the Application of the Three-Factor Analysis</i>	2020
V. JUSTIFICATION, AN ALTERNATIVE, AND RELEVANT COUNTERARGUMENTS	
<i>A. Logical Justification of the Three-Factor Analysis</i>	2021
<i>B. Sensitive Places Licensing Alternative</i>	2022
<i>C. Counterarguments</i>	2023
CONCLUSION	2024

INTRODUCTION

One Sunday morning in Atlanta, Georgia, Sheila Clancy Wilson went to church, a “sensitive place” in which the State of Georgia bans the carrying of firearms.¹ However, neither the “sensitive place” title nor the gun ban stopped Wilson from carrying a .44 caliber pistol into church that day. While preparing for the service that morning, Wilson shot and killed Rev. Johnny Clyde Reynolds, Wilson’s mother, and herself.²

No criminal planning such a shooting would be deterred by the ban on guns in places of worship. Only law-abiding individuals obey firearm bans and disarm themselves in fear of criminal sanctions. What then are honest citizens to do when confronted with a serious threat of criminal violence in a place of worship?

¹ GA. CODE ANN. § 16-11-127 (2011). In oral arguments before the Eleventh Circuit Court of Appeals, the attorney for the State of Georgia, Laura Lones, argued that the statute does not completely ban the carrying of handguns in places of worship because there are some exceptions. Greg Bluestein, *Court Considers Ga. Ban on Guns in Churches*, YAHOO! NEWS (Oct. 6, 2011), <http://news.yahoo.com/court-considers-ga-ban-guns-churches-153553370.html>. Lones argued that “the law can be interpreted to allow gun owners to bring their weapons into houses of worship as long as they have permission and keep the weapons secured.” *Id.* Circuit Judge Ed Carnes perceived the proposed loose interpretation of the statute as questionable. *Id.* Lones was referring to GA. CODE ANN. § 16-11-127(d)(2) (2011), which states that subsection (b) (which lists the places in which handguns cannot be carried) does not apply to someone with a license to carry a gun who approaches management of a location and follows instructions on “removing, securing, storing, or temporarily surrendering” the gun.

² Jefferey Gettleman, *Pastor and 2 Others are Killed in Shooting in Atlanta Church*, N.Y. TIMES (Oct. 6, 2003), <http://www.nytimes.com/2003/10/06/us/pastor-and-2-others-are-killed-in-shooting-at-atlanta-church.html>.

There is seemingly only one thing they can do, which is also particularly fitting considering the setting—pray. Laws prohibiting the carrying of handguns in a place where insufficient security is provided essentially divests people within these sensitive places of the fundamental right to self-defense when confronted with a serious threat of criminal violence.

In *District of Columbia v. Heller*, the Supreme Court declared laws that generally prohibited the possession of handguns and the possession of any other gun in operable condition inside one's home unconstitutional.³ The Court declared that the right to self-defense was an inherent right contained within the Second Amendment.⁴ The Court also determined that handguns were the most popular form of self-defense in the nation and depriving citizens of the ability to possess a working handgun in their home violated their fundamental right to self-defense.⁵ The Court also recognized, however, that their decision should do nothing to overturn longstanding prohibitions on gun possession in "sensitive places" such as schools and government buildings.⁶ However, the *Heller* Court gave no guidance as to defining a "sensitive place."

When a person enters a government building, airport, or public school, the right to self-defense is not infringed upon because the ability to defend is transferred to those providing security in that sensitive place. There are metal detectors and federal agents in federal buildings, and police officers and security guards in airports and public schools. However, it is a rarity to see any of these in each building on university campuses or places of worship.

One's right to self-defense can be subject to greater restrictions when present in "sensitive places." This Comment argues that a logical interpretation of the "sensitive places" language is a place which contains sensitive information, material, activities, or personnel. In such places, the Second Amendment allows the carrying of handguns to be prohibited as long as sufficient security is provided as a substitute for the ability of persons to defend themselves. The same sensitivity that

³ *District of Columbia v. Heller*, 554 U.S. 570, 574-75, 635 (2008).

⁴ *Id.* at 628.

⁵ *Id.* at 629.

⁶ *Id.* at 626.

justifies denying an individual the right to carry a handgun in a place also demands the presence of an alternative source of security in that place. A failure to provide a self-defense substitute in lieu of the ability to carry a handgun places the sensitivity of that place in question and should result in a finding of unconstitutionality of that law.

Applying both free speech and due process principles to a broad interpretation of the *Heller* decision creates a duty upon the State to protect individuals when the State's affirmative action's result in the limiting of the ability of individuals to defend themselves inside or outside their homes.

It is important not to misinterpret this Comment as advocating for the right to carry a handgun anywhere a person pleases. This Comment advocates only that individuals should have a means of defense available to them when the state restricts the carrying of handguns in a place. The way in which this security is provided—through self-defense by use of a handgun, or through the presence and action of a security force—is not as important as the general availability of the security.

This Comment proposes a three-factor test to determine if the level of security provided is in proper ratio to the level of sensitivity present in a place. First, a court must determine whether or not the place in question is sensitive. Second, a court must determine if the place in question is publicly or privately owned, and if privately owned, whether or not the public is invited to enter the premises. Finally, a court must determine if the security provided is sufficient to ensure the security of those found in that place. A comparison of the level of sensitivity of that place to the level of security provided can determine the sufficiency of the place's security.

Part I explores previous interpretations of sensitive places and gives an overview of the right to self-defense and a state's duty to protect. Part II examines why places traditionally labeled as sensitive are labeled as such. Part III reconsiders the traditional acceptance of handgun restrictions based on place and explores how prohibitions on handgun carrying in sensitive places creates and imposes upon the state a duty to protect individuals found in those sensitive places. Part IV proposes a three-part test to use when evaluating the constitutionality of handgun

prohibitions in sensitive places. Finally, Part V highlights the logic of the proposed approach, proposes an alternative to sensitive place handgun bans, and addresses relevant counterarguments.

I. *HELLER* AND SENSITIVE PLACES

In *District of Columbia v. Heller*, the Supreme Court addressed the constitutionality of laws that generally prohibited the possession of handguns and the possession of any gun in operable condition.⁷ Plaintiff Dick Heller challenged the constitutionality of these laws on the grounds that his inability to carry a handgun without a license within his home violated his Second Amendment rights.⁸ After an extensive historical analysis of the Second Amendment, the Court declared the laws in question to be unconstitutional.⁹

A. *Sensitive Places*

In *Heller*, the Court made it clear that “nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings”¹⁰ The inclusion of the “sensitive places” language and the exclusion of any guidelines for determining what qualifies a place as sensitive has led to confusion and countless debates among legal scholars.

1. The Struggle to Define Sensitive Places

In *Nordyke v. King*, the Ninth Circuit Court of Appeals addressed the constitutionality of a law that prohibited the carrying of firearms or ammunition on county property.¹¹ Within the decision, the court discussed the *Heller* “sensitive places”

⁷ *Id.* at 574.

⁸ *Id.* at 575-76.

⁹ *Id.* at 635.

¹⁰ *Id.* at 626.

¹¹ *Nordyke v. King*, 563 F.3d 439, 443 (9th Cir. 2009), *vacated*, 611 F.3d 1015 (9th Cir. 2010).

dictum.¹² The court stated that schools and government buildings were specifically mentioned to be examples "because possessing firearms in such places risks harm to great numbers of defenseless people (e.g., children)."¹³ Judge O'Scannlain, author of the opinion, further wrote that both "government buildings and schools are important to government functioning."¹⁴ The court found that the county fairgrounds in question fit within the sensitive places exceptions because it is a place "where high numbers of people might congregate."¹⁵ However, any precedential value this decision had was subsequently erased only three months later when the Ninth Circuit vacated the decision and ordered the case to be reheard in light of *McDonald v. Chicago*.¹⁶ Upon rehearing, the court failed to repeat any of its relevant discussion of sensitive places addressed in the original decision.¹⁷

It has been suggested that schools are a place in which handgun regulations will be presumptively lawful because there is a high concentration of children present.¹⁸ Some interpretations of *Heller* maintain that the sensitive places dictum (handgun bans are constitutional) refers to all public places, while the holding (handgun bans are unconstitutional) refers to only the home, "where there is no regular presence of the police or other state provided security."¹⁹ This line of reasoning makes sense when one considers the idea that in both government buildings and public schools the government arguably has a duty to provide security.²⁰

The idea that this public-private distinction relies on the difference of available security in the particular place counters the presumption of constitutionality regarding handgun bans in public

¹² *Id.* at 459.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 460.

¹⁶ *Nordyke v. King*, 575 F.3d 890 (9th Cir. 2009); see also *Nordyke*, 611 F.3d 1015. *McDonald* addressed the constitutionality of a handgun ban in Chicago. 130 S. Ct. 3020 (2010). The Court found that the Second Amendment was applicable to the states through the Fourteenth Amendment. *Id.* at 3026.

¹⁷ *Nordyke v. King*, 644 F.3d 776 (9th Cir. 2011).

¹⁸ George A. Nation III, *The New Constitutional Right to Guns: Exploring the Illegitimate Birth and Acceptable Limitations of this New Right*, 40 RUTGERS L.J. 353, 414 (2009).

¹⁹ *Id.*

²⁰ *Id.*

places. That is, bans in public places are presumptively constitutional because there is a "regular presence of . . . police or other state provided security."²¹ Likewise, bans inside private homes are presumptively unconstitutional because "there is no regular presence of . . . police or other state provided security."²² Following this line of reasoning, one can argue that a handgun ban in any place in which there is no regular presence of police or other security is presumptively unconstitutional.

The need for a clearer understanding of the definition of a sensitive place is evidenced by the wide variation of places that courts have found sensitive when considering gun prohibitions. The point at which a court declares a private drive a sensitive place,²³ therefore maintaining the power to restrict a person's ability to carry a gun, is the point at which a standard defining sensitive places must be set.

2. Traditional Acceptance of Place Restrictions

While *Heller* did hold that an undue restraint on an individual's ability to defend oneself inside their home with a handgun was unconstitutional, the opinion set limits on the extent to which this holding could be applied.²⁴ The very language in dispute in this Comment attempts to limit the application of the holding and attempts to prevent justifying unreasonable and unrestricted freedom in carrying handguns. In the footnote following the "sensitive places" disclaimer, the Court states, "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."²⁵ Part, if not all, of the Court's reasoning in not calling into question other types of handgun prohibitions not specifically at issue in *Heller* is because those restrictions are "longstanding." Prior to *Heller*, many states addressed and affirmed the constitutionality of

²¹ *Id.*

²² *Id.*

²³ *People v. Yarbrough*, 86 Cal. Rptr. 3d 674, 682-83 (Cal. Ct. App. 2008). The California Court of Appeals found that, "a residential driveway that was not closed off from the public and was populated with temporary occupants falls within the 'historical tradition' of prohibiting the carrying of dangerous weapons in publicly sensitive places." *Id.*

²⁴ *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

²⁵ *Id.* at 627 n.26.

prohibitions on carrying handguns, particularly concealed weapons,²⁶ into certain places.

Given the general historical acceptance of place restrictions on the ability to carry handguns, an exhaustive historical analysis of this tradition would be too time consuming for the reader and divert attention from the purpose of this Comment, that purpose being to consider place restrictions in a different light rather than their interpretation prior to *Heller*. Handgun prohibitions ruled upon after *Heller* must consider this tradition of acceptance along with a new emphasis placed upon the inherent and fundamental right to self-defense that is best provided by the handgun.

B. Self-Defense

The Court in *Heller* used a self-defense rationale to strike down the laws restricting handgun possession within the home. Justice Scalia wrote that "the inherent right of self-defense has been central to the Second Amendment right."²⁷ Further, the Court recognized that "the American people have considered the handgun to be the quintessential self-defense weapon."²⁸ In prohibiting people from utilizing handguns within their homes, the laws unconstitutionally divorced people from their right to self-defense.

Courts within the United States have long recognized self-defense as an inherent right.²⁹ In *United States v. Outerbridge*, the Circuit Court of the District of California declared:

A man may repel force by force in the defense of his person, his family, or property, against any one, who manifestly endeavors by violence or surprise to commit a felony, as murder, robbery, or the like. The right to oppose force to force in such case is founded upon the law of nature, and is not and can not be superseded by the law of society.³⁰

²⁶ Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1516 (2009).

²⁷ *Heller*, 554 U.S. at 628.

²⁸ *Id.* at 629.

²⁹ See *United States v. Outerbridge*, 27 F. Cas. 390 (C.C.D. Cal. 1868).

³⁰ *Id.* at 392.

Critics of the so-called “safe-harbor” doctrine—the notion that traditionally accepted prohibitions within public schools, government buildings, etc. are “safe” from being declared unconstitutional under *Heller*—have trouble reconciling the recognition of a right as inherent and fundamental with the possibility of that right being suspended depending upon where a person may be. Instead, a more logical view seems to be that self-defense must be possible wherever people have a legal right to be.³¹ In places where effective security is provided, the need for self-defense is less pressing as the state or security force present has assumed a protective role over the people present in that place. Restrictions on handgun carrying are not as threatening to the core interests protected by the Second Amendment in places where effective security is provided as they are in places providing insufficient security.³²

The laws struck down in *Heller* specifically restricted one’s right to possess an operable gun inside his or her home.³³ The Court stated that inside one’s home is “where the need for defense of self, family, and property is most acute.”³⁴ However, the Court never asserts that the home is the only place where self-defense is necessary or available. If read narrowly, as many courts have,³⁵ *Heller* may only protect a person’s right to self-defense through the use of a handgun while inside the home.³⁶ However, such a narrow reading focused on only home defense would limit the application of the important part of *Heller*’s rationale, namely the inherent right to self-defense.³⁷

“[T]he most natural reading of *Heller* . . .” leads one to the conclusion that the right to bear arms in self-defense extends to

³¹ Volokh, *supra* note 26, at 1515.

³² *Id.* at 1526.

³³ *Heller*, 554 U.S. at 628.

³⁴ *Id.*

³⁵ See *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011); *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009).

³⁶ *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010). The court in *Skoien* emphasized the idea that the language used in *Heller* should not be used to achieve broader goals than what the Court intended. *Id.* The only clear and specific holding present in the *Heller* decision is “that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense.” *Id.*

³⁷ Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551 (2009).

areas outside of one's home.³⁸ The fact that the inherent right to self-defense is infringed upon by a law that prohibits possession of a handgun (the principle found in *Heller*), plus the universally accepted principle that the right to self-defense extends further than the inside of one's home, leads one to conclude that a law prohibiting the possession of a handgun for self-defense outside of one's home is unconstitutional. One caveat that must be added to this analysis is that the right to self-defense is not alienated when an individual is not allowed to carry a handgun in a place that provides sufficient security. Instead, the means of defense is simply transferred from the individual to the security force. Nevertheless, people found outside their homes and within sensitive places should not be left defenseless.³⁹

The ability and right to defend oneself is not restricted to a place of residence. Self-defense is available to a person wherever there is an imminent threat of bodily harm or another person's conduct puts one in apprehension of imminent bodily harm.⁴⁰ This right to self-defense exists as long as the danger exists, or as long as the person utilizing self-defense believes the danger exists.⁴¹ While the place in which the act of self-defense occurs is a consideration, it is not a controlling factor.⁴² A principle requirement in determining the availability of the defense of self-defense in both criminal and civil cases is that "the actor's conduct must be measured against the danger faced; to be characterized as self-defense the response must be in proportion to the danger . . ."

⁴³

A person who arms himself in anticipation of the need for self-defense does not lose the right to self-defense simply because

³⁸ Michael P. O'Shea, *The Right to Defensive Arms after District of Columbia v. Heller*, 111 W. VA. L. REV. 349, 378 (2009).

³⁹ Winkler, *supra* note 37, at 1568.

⁴⁰ Russell L. Wald, *Privileged Use of Force in Self-Defense*, in 33 AM. JUR. PROOF OF FACTS 2D 211 (1983).

⁴¹ *Id.*

⁴² *Phoenix v. Carey*, 108 So. 2d 268, 269 (La. Ct. App. 1959). The court stated that "[o]ne might be justified to act upon an impulse of self-preservation when suddenly confronted by an assailant from ambush, or by an intruder in his home." *Id.* This statement essentially equated the amount of force that could be used inside a person's home with the amount of force that could be used outside a person's home in case of "ambush."

⁴³ Wald, *supra* note 40.

he anticipated that need.⁴⁴ The means used in self-defense are justifiable as long those means were necessary to avert the threatened injury.⁴⁵ Therefore, the use of a handgun in self-defense would be acceptable, as long as a handgun would be deemed necessary to prevent the feared injury. Certainly, the use of a handgun should be considered reasonable and perhaps necessary to defend oneself against another using a gun.

C. Broad Application of *Heller*

Efforts to apply *Heller*'s recognition of an inherent right to self-defense through the use of a handgun to places outside an individual's home have been met with bitter opposition.⁴⁶ However, a broader reading of *Heller* is justified in light of how courts often broadly interpret prior decisions in order to extract important principles within those decisions.

The holding in *Brown v. Board of Education* and the line of cases that followed addressing racial segregation provide an illustrative example of how a broad reading of a court decision was justified and generally accepted.⁴⁷ The decision in *Brown* declared that "in the field of public education the doctrine of 'separate but equal' has no place."⁴⁸ Less than a year after *Brown*, the Fourth Circuit was presented with a case that demanded a ruling on the constitutionality of segregated beaches.⁴⁹ In deciding the case, the court looked to *Brown* to assess the constitutionality of the segregation.⁵⁰ After considering the line of reasoning the Court used in *Brown*, the Fourth Circuit stated:

[I]t is obvious that racial segregation in recreational activities can no longer be sustained as a proper exercise of the police power of the State; for if that power cannot be invoked to sustain racial segregation in the schools, . . . it

⁴⁴ *Id.*

⁴⁵ *United States v. Outerbridge*, 27 F. Cas. 390, 392 (C.C.D. Cal. 1868).

⁴⁶ *See United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011); *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009).

⁴⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954).

⁴⁸ *Id.* at 495.

⁴⁹ *Dawson v. Mayor of Baltimore*, 220 F.2d 386 (4th Cir. 1955) (per curiam).

⁵⁰ *Id.* at 387.

cannot be sustained with respect to public beach and
bathhouse facilities ⁵¹

After citing *Brown* in case after case to strike down laws mandating the separation of the races, it became clear that the Court accepted "the universality and permanence of the principle that segregated public facilities of any kind were no longer permissible under the Fourteenth Amendment."⁵² Here, as in subsequent cases following *Brown*, it is imperative that the guiding principle and intent of the Court is not hidden by the details of the case announcing that principle.

The importance of the *Heller* decision lies in the recognition of the fact that each individual has an inherent and fundamental right to self-defense which is severely restricted by a prohibition on the ability to carry or possess a handgun.⁵³ While *Heller* specifically considered laws that applied only inside one's dwelling, the right to self-defense and the right to the means necessary to defend oneself extends beyond one's home.

The argument for a broad application of *Heller* is made even stronger when the Second Amendment is not considered separately but rather as a member of the Bill of Rights. Other provisions in the Bill of Rights are viewed as deserving of adherence, regardless of the impact on policy concerns.⁵⁴ This idea is most obvious when considering freedom of speech and the rights of criminal defendants.⁵⁵ Generally, Americans are accepting of the fact that citizens enjoy the right to say whatever they choose, even if that means they must endure speech that offends even the most calloused hearts.⁵⁶ Also, it is accepted that the American justice system ensures criminal defendants with due process and other protections, despite the fact that this inevitably will lead to

⁵¹ *Id.*

⁵² *Palmer v. Thompson*, 403 U.S. 217, 243 (1971).

⁵³ *District of Columbia v. Heller*, 554 U.S. 570, 628-29 (2008).

⁵⁴ Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989). Levinson cites Ronald Dworkin's "taking rights seriously" for the idea that, "what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so." *Id.* at 657-58.

⁵⁵ *Id.* at 658.

⁵⁶ Levinson cites "oppressed groups having to hear viciously racist speech" as an illustration of this. *Id.*

some criminals going free and potentially committing further crimes.⁵⁷

This type of analogy often strikes a nerve with "liberal" defenders of the Bill of Rights as they often read the Second Amendment out of the Bill of Rights.⁵⁸ Conservatives will argue that statistics prove that fewer restrictions on the ability to carry a handgun will lead to less violent crime, while liberals will present just as much empirical data supporting their view that further restricting the carrying of handguns will reduce violent crime. Political alliances and opinions on whether or not it is justified aside, both sides can agree on the existence of a pedigree within American jurisprudence that individual rights often trump prudential arguments. There is no reason why the Second Amendment and the right to defend oneself with the most effective form of self-defense should be any different.

D. The Duty to Protect

The importance of a sufficient means of self-defense is brought to light when one realizes that "in general, the police have no duty to protect individuals."⁵⁹ The Seventh Circuit made this point clear in their decision of *Hernandez v. City of Goshen*, stating "police departments have no duty to protect private persons from injuring each other, at least where the police department has not itself created the danger."⁶⁰ Courts have reinforced a citizen's right to carry a gun by consistently holding that an individual's defense is primarily the duty of that individual.⁶¹

The fact that, in general, the government has no duty to protect individual citizens may seem to preempt the argument proposed in this Comment. Why would a government which prohibits the carrying of guns in sensitive places have to provide

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Robert A. Creamer, Note, *History is Not Enough: Using Contemporary Justifications for the Right to Keep and Bear Arms in Interpreting the Second Amendment*, 45 B.C. L. REV. 905, 932 (2004). The author further notes that the police only assume a duty of individual protection when a specific offer of protection is made to the citizen. *Id.*

⁶⁰ *Id.* at 933 (quoting *Hernandez v. City of Goshen*, 324 F.3d 535 (7th Cir. 2003)).

⁶¹ *Id.* at 932.

security for its citizens if there is no duty to do so? In order to find the answer to this question relevant to the Second Amendment the Fourteenth Amendment must be considered for guidance.

The Court has declared that the protection of life, liberty, and property guaranteed by the Due Process Clause of the Fourteenth Amendment only protects citizens from the direct actions of the State, not other private citizens.⁶² This principle holds true even when governmental intervention is necessary to preserve the life, liberty, or property of its citizens.⁶³ However, there are recognized exceptions to this general principle of no duty to protect. One such exception exists when the State holds someone in custody against his or her will—such is the case with prisoners.⁶⁴ In *DeShaney v. Winnebago County Department of Social Services*, the Court announced the rationale behind this exception:

[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and *reasonable safety*—it transgresses the substantive limits on state action set by the . . . Due Process Clause.⁶⁵

The duty to provide protection to its citizens is imposed upon a State only when the positive actions of the State limit the individual's ability to "act on his own behalf," rather than the

⁶² *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195-99 (1989). This case involved a minor who had been beaten so severely by his father that the child suffered permanent brain damage and was rendered "profoundly retarded." *Id.* at 193. This occurred after the minor had been in temporary custody of the Winnebago County Department of Social Services. *Id.* at 192.

⁶³ *Id.* at 196. The Court went on to declare later in the opinion that "[a]s a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197; *see also* *Walter v. Pike Cnty.*, 544 F.3d 182, 191-92 (3d Cir. 2008) (stating that the state-created danger doctrine provides an exception to the generally accepted rule that a state has no duty to protect individuals within its borders even if governmental intervention may be necessary to prevent harm to those individuals.).

⁶⁴ *Id.* at 199-200 (citing *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982)).

⁶⁵ *Id.* at 200 (emphasis added) (citing *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976)).

State's knowledge of the need for protection.⁶⁶ The same positive action on the part of the State that deprives an individual of his liberty triggers the protection of the Due Process Clause.⁶⁷

In *DeShaney*, the majority states that a duty to protect is imposed upon the State when the State assumes a protective role, while Justice Brennan's dissent argues for an even broader application of the scope of this exception.⁶⁸ Justice Brennan states that the majority's effort to restrict affirmative acts by the State only to those acts that directly physically control the individual is too narrow.⁶⁹ Instead, many affirmative State actions can impose a duty to act on the State.⁷⁰ Specifically, Justice Brennan argues that "the monopolization of a particular path of relief" may impose a positive duty.⁷¹

Courts differ over what elements must be present in order to apply the state-created danger doctrine. At a minimum, most courts agree that (1) the state had to have either created the danger or made the individual more vulnerable to danger, and (2) the state or state actor acted with a high degree of indifference for the safety of the individual.⁷² Some courts also require additional elements that (3) the harm perpetrated upon the individual was foreseeable, and (4) that there existed some type of special relationship between the State and the individual.⁷³

The State's enacting and enforcing gun control legislation places an individual in increased danger by removing their right

⁶⁶ *Id.* ("The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expression of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." (citing *Estelle*, 429 U.S. at 103)).

⁶⁷ *Id.*

⁶⁸ *Id.* at 206-07 (Brennan, J., dissenting).

⁶⁹ *Id.*

⁷⁰ *Id.* at 207 (Justice Brennan cites cases in which the Court recognized the imposition of positive duties on a state, including the "striking down [of] a filing fee as applied to divorce cases brought by indigents . . . and, in deciding that a local government could not entirely foreclose the opportunity to speak in a public forum.").

⁷¹ *Id.*

⁷² *Breen v. Tex. A&M Univ.*, 485 F.3d 325 (5th Cir. 2007); *Ulibarri v. City of Denver*, 742 F. Supp. 2d 1192 (D. Colo. 2010); *Taylor v. Altoona Area Sch. Dist.*, 737 F. Supp. 2d 474 (W.D. Pa. 2010); *Johnson v. City of Seattle*, 385 F. Supp. 2d 1091 (W.D. Wash. 2005).

⁷³ *Phillips v. Cnty. of Allegheny*, 515 F.3d 224 (3d Cir. 2008); *Ye v. United States*, 484 F.3d 634 (3d Cir. 2007).

to defend themselves with a gun. Essentially, the same duty to protect that exists when the State has physical custody of someone exists when the State restricts a person's ability to provide for his or her own safety by restricting the individual's ability to carry a handgun in sensitive places.

E. The Necessity of General Licensing to Carry a Weapon

Before wading into the argument section of this Comment, it is imperative to understand that in all instances where this Comment advocates for the ability of an individual to be able to carry a handgun, it is referring to those individuals who are otherwise (aside from the sensitive place restriction) legally able to carry a gun. That is, the individual has obtained a permit or a license to carry a weapon (concealed or not, depending upon the state) within that state. At no point does this Comment advocate for an individual to be allowed the ability to carry a gun into sensitive places without a permit or a license to do so.

This Comment applies only to those laws prohibiting the carrying of handguns in states which (a) do not provide any avenue for citizens to obtain the ability to carry a handgun or (b) provide for the opportunity to obtain a license to carry a handgun, but restrict the carrying of that gun into sensitive places. The laws in states that provide the opportunity to obtain an enhanced license to carry handguns in sensitive places would not be affected by the analysis set forth in this Comment.

The *Heller* decision declared that the Second Amendment referred to carrying arms.⁷⁴ Further, the right to carry a gun in public for self-defense has been recognized by many state courts.⁷⁵ With that said, for the purpose of this Comment, a discussion of the details of gun carry licensing is not necessary. It is only necessary to know that courts have recognized a right of

⁷⁴ Volokh, *supra* note 26, at 1516 (citing *Dist. of Columbia v. Heller*, 554 U.S. 570, 584 (2008)).

⁷⁵ *State v. Chaisson*, 457 So. 2d 1257 (La. Ct. App. 1984). The Louisiana appellate court in this case recognized that a prohibition on "froggers" from carrying guns while "frogging" was in direct conflict with the provision of the Louisiana Constitution providing for citizens to "keep and bear arms." *Id.* at 1258-59. The necessity of the ability to carry a gun in this instance existed for purposes of self-defense.

individuals to obtain a license or permit to carry a weapon,⁷⁶ and that in many states, only minimal requirements need to be met to obtain a permit to carry a weapon.⁷⁷

II. SENSITIVITY AND SECURITY: PLACES THAT MAY BE SENSITIVE

While the *Heller* opinion made it clear that the Court was not invalidating the restriction of handguns in sensitive places,⁷⁸ its failure to explain the “sensitive places” language weakens this presumption of constitutionality. The Court failed to lay out any framework on how to categorize or define a sensitive place. In an attempt to see through the haze surrounding sensitive places, this Comment analyzes places that are traditionally accepted as “sensitive.” First, it will examine all the characteristics of each sensitive place which contribute to its sensitivity. This includes looking at the people, material, and activities that are usually present in that place. Second, the Comment will consider the different measures of security that are usually provided in those same places. This includes security personnel, cameras, locked doors, and various other measures.

A. Government Buildings

1. Reasons for Sensitivity

There are some logical explanations as to why a place may be deemed sensitive.⁷⁹ In the case of government buildings, a

⁷⁶ *E.g.*, *Lovering v. Dettre*, 55 York 142 (Pa. Ct. Q. Sess. 1941). In *Lovering*, a sixty-year-old man applied for a permit to carry a concealed weapon which was subsequently denied by the sheriff. *Id.* Upon review, the court found that because this man was older in age, had extensive experience with guns, lived in a rural area where police protection may take an extended amount of time to arrive, and since there was no reason to fear he would use a gun for unlawful reasons, he deserved the right to carry a concealed weapon. *Id.*

⁷⁷ *E.g.*, *Iley v. Harris*, 345 So. 2d 336 (Fla. 1977). In *Iley*, the Florida Supreme Court upheld the appellate court decision that previously stated that since the plaintiff met the age and good moral character requirements announced in the relevant statute, it was unnecessary for the plaintiff to prove he had good cause to carry a gun. *Id.*

⁷⁸ *Dist. of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

⁷⁹ *GeorgiaCarry.org, Inc. v. Georgia*, 764 F. Supp. 2d 1306, 1316-17, 1319 (M.D. Ga. 2011). First, the court states that there is no “unifying theme” which places of worship share with schools and government buildings that would cause the places of worship to

restriction on gun carrying may be made because of the type of activities that occur in these buildings. The activities pursued and the information contained within these buildings may themselves be "sensitive." This is easy to see if one considers homeland defense or security information. The government has a compelling interest in protecting information and activities associated with developing defense strategy. Also, there are often government officials present in these government buildings who could be directly targeted by criminals.

2. Government Provisions of Security

These buildings are deemed so "sensitive" that preventive security measures have been put in place to further secure those individuals inside these areas.⁸⁰ For example, federal courthouses have metal detectors and U.S. Marshalls present at public entrances. If a threat does slip by the initial screening, there is a sufficient security force (the U.S. Marshalls) to stop the threat quickly. The federal government has conducted studies assessing the security of government buildings and classifying the levels of security provided.⁸¹ In the context of government buildings,

gain membership into the community of "sensitive places." *Id.* at 1316-17. Then, the court stated:

A place, such as a school, might be considered sensitive because of the people found there. Other places, such as government buildings, might be considered sensitive because of the activities that take place there. A reasonable argument can be made that places of worship are also sensitive places because of the activities that occur there.

Id. at 1319.

⁸⁰ Recently, the Arizona legislature passed a bill addressing the ability of individuals to carry handguns inside of government buildings. Howard Fischer, *AZ House OKs Guns in Public Buildings*, ARIZ. DAILY STAR (Apr. 18, 2011, 12:00 AM), http://azstarnet.com/news/local/govt-and-politics/article_674e66f8-a6a5-53d5-9065-a855dd84801a.html. Prior to the passing of SB 1201, public agencies could keep guns off their premises "by posting signs at the doors and providing places for those coming in to check their weapons." *Id.* Senate Bill 1201 requires that metal detectors and security guards be present if the ability to carry a firearm is restricted. *Id.* In giving a justification of this bill, Rep. Eddie Farnsworth, R-Gilbert, stated that the prior restrictions were "meaningless." *Id.* Rep. Farnsworth viewed the situation with a focus on self-defense, concluding that if the state is going to remove the ability of an individual to defend him or herself, then the state also has a responsibility to secure that area through the use of metal detectors and security guards. *Id.*

⁸¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-8, BUILDING SECURITY: SECURITY RESPONSIBILITIES FOR FEDERALLY OWNED AND LEASED FACILITIES 7 (2002), *available*

governments have recognized that a place's sensitivity should play a role in whether or not handguns are allowed into that place, as well as the amount and type of security provided in that place.

B. Public Schools

1. Reasons for Sensitivity

The prohibition of carrying guns on public school grounds also has a logical explanation. Public schools contain a high density of children who are vulnerable and likely unable to defend themselves. Also, ensuring the maintenance of the educational process is seen as vital to the overall well-being of the nation, particularly in the economic realm.⁸²

at http://www.securitymanagement.com/archive/library/Gao0308_Building0203.pdf. Government building security came to the forefront of government concern following the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. *Id.* Following this attack, President Clinton called on the Department of Justice (DOJ) to "assess the vulnerability of federal office buildings." *Id.* The DOJ came up with a system in which buildings can be classified on a scale from one to five. *Id.* "A level I facility has 10 or fewer federal employees. In addition, the facility likely has 2,500 or less square feet of office space and a low volume of public contact or contact with only a small segment of the population." *Id.* at 43. "A level IV facility has over 450 federal employees. In addition, the facility likely has more than [sic] 150,000 square feet; high volume of public contact; and tenant agencies that may include high-risk law enforcement and intelligence agencies, courts, judicial offices, and highly sensitive government records." *Id.* "A level V facility is a building such as the Pentagon or CIA Headquarters that contains mission functions critical to national security. A level V facility is similar to a level IV facility in terms of number of employees and square footage." *Id.* at 44.

⁸² In *United States v. Lopez*, the United States Supreme Court addressed the constitutionality of the Gun Free School Zones Act. 514 U.S. 549 (1995). While the majority of the Court found that the federal government could not prohibit the carrying of guns on school campuses through an interstate commerce rationale, Justice Breyer dissented arguing that this regulation was well within the power of the federal government. *Id.* at 615-31 (Breyer, J., dissenting). The reasoning employed by Justice Breyer involved connecting the carrying of guns on school campuses to a negative effect upon the economy. Justice Breyer cited studies that guns on and around school campuses often lead to "widespread violence." *Id.* at 619. This widespread violence then translates into a degradation of the quality of education as evidenced by the fact that gun violence is worst at inner-city schools and drop-out rates are highest in inner-city schools. *Id.* Justice Breyer concluded that guns at school lead to "teachers unable to teach [and] students unable to learn" *Id.*

2. Government Provisions of Security

These concerns have led public schools to take many steps to secure the perimeter of the schools.⁸³ The vast majority of public schools keep their premises locked and monitored.⁸⁴ Some schools employ the use of metal detectors to prevent the entrance of a dangerous weapon into the school. Like federal government buildings, some schools have either a capable security force or local police officers stationed at the school itself to quickly quell a violent outbreak. Public schools are sensitive enough to employ preventive security measures should a security or safety threat become real.

In both government buildings and public schools, legislatures have decided that these places are sensitive enough to ban the carrying of handguns. These places are also sensitive enough for the State or other capable entities to assume a protective role and provide preventive security. However, when one considers campuses of public universities and places of worship, the differences begin to appear as quickly as defenses provided disappear.

C. Public Universities

1. Reasons for Sensitivity

Carrying guns is often prohibited on the campuses of public universities.⁸⁵ There is usually a high density of people in the

⁸³ The U.S. Department of Education conducted a study during the 2007-08 school year on security and safety measures employed by public schools. *Fast Facts: School Safety and Security Measures*, NATIONAL CENTER FOR EDUCATION STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=334> (last visited Apr. 11, 2012).

⁸⁴ *Id.* The study found that 80.6% of public schools control access into the building through means such as locking the doors or monitoring who comes through the doors. *Id.*

⁸⁵ Many critics of the right to carry handguns on the campuses of public universities believe that the presence of guns on campus increases many different types of risks to college students. Elise Gauthier & Penny Okamoto, *Student Safety: Oregon Should Ban Guns on Public College Campuses*, OREGONLIVE.COM (Oct. 4, 2011, 4:55 AM), http://www.oregonlive.com/opinion/index.ssf/2011/10/student_safety_oregon_should_b.html. Gauthier and Okamoto claim that somehow gun ownership is tied to binge drinking, cocaine and crack use, driving under the influence, vandalizing property, and in general gun owning students are more likely to "get in trouble with [the] police." *Id.*

buildings on campus, making them appealing for someone intending to inflict a high number of casualties. Also, the information conveyed within the buildings on campus may be controversial. Such information may arouse hostility towards professors and students as universities often encourage the unrestricted free flow of ideas and viewpoints.

2. Government Provisions of Security

Despite the presence of these sensitive place characteristics, the security provided on university campuses is often insufficient. Universities often have their own police forces which patrol the campus. However, these police forces have the same presence and capability as do police forces that patrol residential neighborhoods, a location in which handguns are allowed for self-defense. Acknowledging the obvious public-private property distinction in this example, the principle remains the same. Using the reasoning from *Heller*, people in residential neighborhoods are allowed to own handguns for self-defense because police will not always be able to respond quickly enough.

Further, police do not have the duty to protect individuals, but rather they have the duty to the general public to maintain peace and order. These principles do not disappear once we set foot on a university campus.

A possible remedy to this situation would be the presence of security through metal detectors or police officers or security guards in every building. Otherwise, the students and professors in the building are stripped of their ability to defend themselves with a handgun and are not provided a sufficient alternate form of security.

D. Places of Worship

1. Reasons for Sensitivity

A more obvious violation of the Second Amendment occurs in laws that prohibit the carrying of handguns in places of worship. First, places of worship are privately owned as opposed to the three previous places discussed—which are owned by the government. Naturally, the government should have less power in deciding who and what come on to private land, rather than public

land.⁸⁶ Second, places of worship rarely provide any type of security through the use of metal detectors, screenings, police officers, or security guards. Third, there is usually a high density of people inside a place of worship. Fourth, there is sensitive information being conveyed during the worship services which could be offensive to some listeners and evoke hostile reactions. Finally, there is the presence of a worship leader who sometimes conveys controversial messages, and is an easy target for one wishing to silence him or her.

2. Government Provisions of Security

If there are any police officers in the vicinity of the place of worship, the same principle of no duty to protect individuals still applies. Aside from the police officers who also have to patrol the rest of the city or county, there is often no type of security provided in places of worship. A prohibition of handgun carrying in places of worship and public universities is equivalent to the assumption of a protective role by the government. When a law bans the carrying of guns in places of worship, the government must provide sufficient security for that place in order for the application of that law to be constitutional.

III. TRADITIONAL ACCEPTANCE OF PLACE RESTRICTIONS REVISITED

As mentioned previously, courts have traditionally accepted place restrictions on the carrying of handguns. The Court in *Heller* states that its decision should not overturn other place restrictions and even goes so far as to say that these prohibitions are “presumptively lawful.”⁸⁷ The language chosen by the Court here

⁸⁶ In speaking about handgun restrictions in places of worship, Kelly Kennett, president of GeorgiaCarry.org, reinforced the idea that challenging these laws are not requiring churches or synagogues or any other place of worship to allow guns into their sanctuary. Bluestein, *supra* note 1. Instead, these challenges are only intended to obtain equal treatment for places of worship as compared to other privately owned properties. *Id.* In relevant part, Kennett stated, “Churches should be treated like any other private property owner. Why are you treating people at churches differently than how you’d be treated at a store, at a bank, at a club?” *Id.*

⁸⁷ Dist. of Columbia v. Heller, 554 U.S. 570, 627 n.26 (2008).

is relevant to understanding the broad application of *Heller* to other cases.

On its face, it seems that the language advocating for a presumption of the lawfulness of place restrictions would defeat any claims of unconstitutionality lodged against these restrictions. However, the fact that something is presumed, by definition, means that the truth of the matter, or constitutionality of the law, is actually not known.⁸⁸ Therefore, a presumption can always be overcome by proving it untrue or incorrect. The clearest illustration of this principle is given in the justice system in which suspects are presumed innocent until proven guilty. Using this illustration, it is easy to see that legal presumptions are overcome all the time. Such is the case with place restrictions on the carrying of handguns.

Generally, states have the ability to restrict the movement of handguns into sensitive places. A presumption of constitutionality exists when considering these restrictions. However, each restriction must be considered on a case-by-case basis to determine whether this presumption will be maintained. In *Heller*, the presumption of lawfulness was overcome by a violation of an individual's right to self-defense. A similar analysis should be employed when considering other place restrictions on handguns. If the analysis of the particular case reveals that the individual is left without sufficient means to defend himself, and a sufficient means of security is not provided in that place, the presumption of lawfulness is overcome.

⁸⁸ *Presumption Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/presumption> (last visited Apr. 11, 2012). A legal presumption is defined by Corpus Juris Secundum as:

an inference or deduction which, in the absence of direct evidence on the subject, the law requires to be drawn from the existence of certain established facts; or a presumption which the law compels, and which may be conclusive or *rebuttable*. It is an assumption made by the law that a strong inference of fact is *prima facie* correct, and will therefore sustain the burden of evidence, *until conflicting facts on the point are shown*. Thus, the effect of a presumption of law is to invoke a rule of law compelling the factfinder to reach the conclusion *in the absence of evidence to the contrary from the opponent*. Where conflicting evidence is introduced, the presumption has served its purpose and drops out of sight, but the evidence must be credible.

31A C.J.S. *Evidence* § 211 (2008) (emphasis added).

A. Application of Due Process Principles to the Second Amendment

A state which prohibits the carrying of handguns in sensitive places assumes the duty to protect those citizens within that place. This proposition can be derived through analogizing the implications of handgun place restrictions with the creation of a state's duty to protect individuals brought about through a state-created-danger. To understand this, one needs only to look at the language the Court has used in cases concerning governmental duties imposed after the State removed or limited certain liberties or rights a law-abiding citizen is entitled to.⁸⁹

As mentioned earlier, the Court declared in *DeShaney* that affirmative acts by the State which prevent an individual from ensuring reasonable safety for himself, accompanied with the failure of the State to provide a means of securing the individual's reasonable safety, results in a violation of the Due Process Clause.⁹⁰ In other words, a state which limits an individual's rights through affirmative acts assumes the responsibility of providing those rights through other avenues. Specifically, Justice Brennan stated "the monopolization of a particular path of relief—may impose upon the State certain positive duties."⁹¹

This principle is directly applicable to the fundamental and inherent right to self-defense contained within the Second Amendment. The State, through an affirmative act, limits the right to self-defense by creating and enforcing the gun control law. Under *Heller*, one cannot deny that a law prohibiting handgun carrying severely hinders the ability to defend oneself.⁹² Further, if the State does not provide sufficient security to ensure the safety of citizens within that place, it has failed to ensure the right of self-defense which was handed over to the State. When a State bans the carrying of handguns in a place, the State becomes the only path to defense against threats of serious bodily harm and death. This obstructed path to defense leads only to a finding of unconstitutionality for the gun control law.

⁸⁹ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

⁹⁰ *Id.* at 200.

⁹¹ *Id.* at 207 (Brennan, J., dissenting).

⁹² *Heller*, 554 U.S. at 629.

Justice Brennan takes this idea a step further in his dissent in *DeShaney*.⁹³ Justice Brennan entertains the idea that inaction can be just as damaging as affirmative State actions, specifically when the State fails to carry out a duty assumed through affirmative action. Justice Brennan argues that he cannot agree with allowing “a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent.”⁹⁴ When a state bans the carrying of handguns in a place, it limits an individual’s private sources of defense, and when it fails to provide sufficient security for those individuals, it essentially turns its back on the duty of protecting the individuals in the sensitive place.

B. Factors Indicating a Duty to Protect

The duty to protect under the Due Process Clause is only imposed upon the state if at least two or four, depending upon the court and state, essential elements are met. In using due process doctrines to guide the application of the Second Amendment, a state banning the carrying of handguns and failing to provide alternate forms of security meets all these elements. Before analyzing the necessary elements, one must realize that there are inherent differences when comparing due process doctrine and Second Amendment doctrine that will not allow for all the elements in due process cases to line up exactly with the circumstances present in Second Amendment cases.

First, an individual must show that “the harm ultimately caused to the plaintiff was foreseeable and fairly direct.”⁹⁵ When a person is harmed by the intentional violent act of a third party in a sensitive place where handguns are banned and security is not provided, this element is easily satisfied. Sufficient evidence of foreseeability is present in the determination of the place as sensitive. A place is usually deemed sensitive because there is some prospect of criminal activity. If this were not true, then the

⁹³ *DeShaney*, 489 U.S. at 203-12 (Brennan, J., dissenting).

⁹⁴ *Id.* at 212.

⁹⁵ *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 235 (3d Cir. 2008) (citing *Bright v. Westmoreland Cnty.*, 443 F.3d 276, 281 (3d Cir. 2006)).

place would not be deemed sensitive and the carrying of handguns would be allowed on the premises.

Second, it is required that "the state-actor acted in willful disregard for the plaintiff's safety."⁹⁶ In addressing this element it is important to realize that usually in due process applications there is one or a limited number of state-actors—usually a police officer or prison guard. In a situation addressing the constitutionality of a gun control law, the State actor is the legislature. Disarming law-abiding citizens in a place that was deemed sensitive because there is some type of threat of violence, combined with the failure to provide sufficient security, is willful disregard for the safety of the individuals. Further, it is likely that the gun control law will only disarm those law-abiding citizens seeking to avoid criminal violations and will have no deterrence effect on criminals already set on killing or seriously harming others. It is only logical to realize that an individual's right to self-defense is alienated when that person is defenseless against the threats of serious bodily injury and death.

Third, there must be "some relationship between the state and the plaintiff."⁹⁷ As there is always some form of relationship between the state and its citizens, presumably this element calls for something more. When a state takes affirmative steps to remove an inherent and fundamental right, the relationship required under this element is formed. That is, when the State removes the ability of a person to defend himself, the State assumes a protective role over that individual. The fact that places where handguns are usually banned (public schools, public universities, places of worship, etc.) are places in which members of the general public are invitees makes this relationship visible.⁹⁸ In tort law, a property owner owes a higher level of duty

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ RESTATEMENT (SECOND) OF TORTS § 332(1)-(2) (1965). The restatement defines an invitee as a public invitee or a business visitor. *Id.* "A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." *Id.*

to those upon his land as invitees.⁹⁹ This general principle holds true in application to handgun prohibition laws.

Finally, the State or State actor must have “used his authority to create an opportunity for danger that otherwise would not have existed.”¹⁰⁰ Critics of the application of due process doctrine to the Second Amendment would likely state in contention that the duty to protect is only imposed upon the State when the State creates the danger *and* “places the person in a position of danger the person would not otherwise have faced.”¹⁰¹ On its face, this counterargument seems to make sense. However, this position only holds true with the narrowest interpretations of this proposed application. In agreeing with this counterargument, one imposes on the State a duty to protect individuals only when the law restricting handguns actually causes the individual to be in a position that he or she would not have been in if it were not for the existence of the law. Upon reflection, one can see that that is exactly what happens when individuals are prohibited from carrying handguns and are not provided with alternative forms of security.

While there is something to be said for the argument that a handgun restriction actually causes crime,¹⁰² a different attack can be made on this counterargument. A logical basis from which this attack must start is that the amount of danger present in any given situation is relative to the circumstances in that situation. For example, if one encounters an assailant wielding a knife who intends to inflict serious bodily harm or death upon a person, that individual is in grave danger if he has only his fists to protect him. If the victim in this situation also has a knife, the danger is still high, but his odds of survival are improved. A victim with a handgun, who will likely lose the title of victim, lowers the level of

⁹⁹ RESTATEMENT (SECOND) OF TORTS § 332 cmt. e (1965). “There are occasional instances where a possessor may be under a greater duty to those who enter as invited members of the public.” *Id.*

¹⁰⁰ *Rivas v. City of Passaic*, 365 F.3d 181, 194 (3d Cir. 2004).

¹⁰¹ *Rranci v. Attorney Gen.*, 540 F.3d 165, 171 (3d Cir. 2008) (citing *Kamara v. Attorney Gen.*, 420 F.3d 202, 216 (3d Cir. 2005)).

¹⁰² This logical argument can be made if one concludes that if a potential criminal knows that nobody in a place can carry a handgun, and there is no security or police force in that place, then the criminal will be more likely to choose that place for the carrying out of a crime due to the reduced likelihood of resistance.

danger even further. In addition, the presence of a police officer or armed security guard would lower the level of danger substantially. As one can see from this example, the inability of an individual to arm himself with a handgun for self-defense actually *creates* a higher level of danger that would not be present but for the gun control law.

Some authorities allow the imposition of a duty to protect upon a state when the actions of the state render “the citizen more vulnerable to danger than had the state not acted at all.”¹⁰³ As discussed above, an individual is more vulnerable to danger when that person is not afforded the most effective form of self-defense against armed assailants. Again, a counterargument threatens to derail this logical approach.

A critique of this proposed approach could argue that danger is actually lessened or eliminated when handguns are kept out of places. While this claim is debatable, and likely dependent upon one’s political alignment, it is flawed. It is possible that the overall safety of a place may be increased by banning the carrying of handguns. However, it is also possible that a place is made less safe by banning the carrying of handguns in that place. Whether the handgun ban makes a place more safe is dependent upon whether an alternate form of security is provided for those individuals in that place. Without a sufficient form of security in place, individuals subject to the handgun prohibition are made more vulnerable to being subjected to serious bodily injury or death than they would be if the state had not imposed such a prohibition.

IV. THREE-FACTOR ANALYSIS TO DETERMINE CONSTITUTIONALITY OF SENSITIVE PLACE HANDGUN PROHIBITIONS

After reviewing those places that are commonly accepted as “sensitive places” (government buildings, public schools, public universities, places of worship, etc.), this Comment proposes a three-factor analysis that can be used to determine the constitutionality of a handgun prohibition in a particular place.

¹⁰³ *Walter v. Pike Cnty.*, 544 F.3d 182, 192 (3d Cir. 2008) (citing *Bright v. Westmoreland Cnty.*, 443 F.3d 276, 281 (3d Cir. 2006)).

Before introducing the proposed test, it is necessary to address the ramifications of a place being deemed “sensitive.” The assumed meaning of “sensitive places” has always been that the place has certain characteristics which make the carrying of guns in that place illegal. However, when one views the meaning of “sensitive places” from an angle which is more concerned with self-defense and security, as was the Court in *Heller*,¹⁰⁴ additional implications arise.

When viewed with an eye on security, deeming a place sensitive necessitates that the governing body provide defense or security to those people within the sensitive place who are unable to defend themselves because of the ban on handguns. It is illogical for a legislature to declare a place sensitive and restrict the ability to carry handguns in that place, yet fail to provide an alternative source of security. As previously discussed, the removal of the ability to defend oneself only increases the need for security because the inability to defend oneself actually increases danger to that person. In fact, the failure to provide some form of security should call into question the actual sensitivity of that place. Any place deemed sensitive enough to prevent the carrying of handguns should also be sensitive enough to demand the provision of some type of security.

A. Level of Scrutiny

A common question when addressing the constitutionality of laws that restrict access to, or possession of, guns is what level of scrutiny should be applied. While *Heller* did not explain what level of scrutiny to apply, it did declare that rational basis should not be employed.¹⁰⁵ Left with only the choice between intermediate and strict scrutiny, most courts have employed an intermediate level of scrutiny to this analysis.¹⁰⁶

The court in *Peruta v. County of San Diego* followed the intermediate scrutiny test set out in *United States v. Marzzarella*.¹⁰⁷ The *Marzzarella* court adopted the scrutiny level

¹⁰⁴ Dist. of Columbia v. *Heller*, 554 U.S. 570 (2008).

¹⁰⁵ *GeorgiaCarry.org v. Georgia*, 764 F. Supp. 2d 1306, 1317 (M.D. Ga. 2011).

¹⁰⁶ *Id.*

¹⁰⁷ *Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010).

standards employed in First Amendment challenges.¹⁰⁸ Under this standard accepted by the Third Circuit, a state must assert an interest that is “significant, substantial, or important.”¹⁰⁹ The challenged restriction must also have a “reasonable, not perfect” fit with the asserted state interest.¹¹⁰

In almost all cases regarding a restriction on the carrying of handguns in a sensitive place, the asserted state interest will be the preservation of public health and safety. There is no argument against the idea that public health and safety are significant, substantial, or important state interests. However, the constitutionality of the restriction will turn on the fit that the restriction has with the asserted state interest. That is, the restriction must, in some degree, promote the asserted state interest.

In essence, this proposed test is an intermediate scrutiny test. The challenged restriction cannot be deemed substantially related to the asserted state interest of public health and safety if people within that place are left without any form of defense or security. The security of a people is inherent in the concept of public safety. However, if a handgun restriction provides alternate forms of security for people, that restriction will be substantially related to the asserted state interest of public health and safety.

When considering handgun place restrictions, a useful analogy to determine the level of scrutiny may be drawn to place restrictions of protected speech. Within the context of First Amendment free speech cases, the time, place, and manner of protected speech may be constitutionally restricted.¹¹¹ The speech restriction will pass constitutional muster if it satisfies an intermediate level of scrutiny.¹¹² This test will be satisfied if the state:

[D]emonstrate[s] that the restriction furthers an important, significant, or substantial government interest, that the interest is unrelated to the suppression of speech, and that the restriction is not substantially broader than

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (internal quotation marks omitted).

¹¹⁰ *Id.*

¹¹¹ 16B C.J.S. *Constitutional Law* § 828 (2005).

¹¹² *Id.*

necessary to further the important governmental interest or that ample alternative methods of communicating the message have been left open.¹¹³

The important implication for place restrictions within the Second Amendment is that in order for a restriction to survive intermediate scrutiny, the state must leave open ample alternative means of self-defense or security. Just as a law that restricts the ability of a person to convey a message without allowing the person another means to convey that message is unconstitutional, a law that restricts a person's right to self-defense by not allowing that person to carry a handgun in certain places is unconstitutional if that person is not provided with alternative means of security.¹¹⁴

B. Factor One: Is the Place Sensitive?

First, the threshold issue of whether or not a place is sensitive must be determined. A place may be deemed sensitive if there is sensitive information or material contained or conveyed in that place. A liberal interpretation of the word "sensitive" should be employed under this threshold issue as there are many characteristics that could make material sensitive. Information regarding defense, homeland security, or military operations is deemed sensitive because of the potential disastrous effects of this information falling into the hands of people with malicious intent. Information may also be sensitive if there is a possibility or likelihood that the information conveyed may be controversial or

¹¹³ *Id.*

¹¹⁴ Still another important analogy can be drawn between the First and Second Amendments regarding the level of scrutiny when generally considering gun restrictions. While this Comment focuses on restrictions placed on carrying handguns outside an individual's home, further research should be conducted upon the different levels of scrutiny used on handgun restrictions depending upon where those restrictions are enforced. For example, the United States Supreme Court has stated that "[g]overnment restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70 (2009). However, other time, place, and manner restrictions are subject to intermediate scrutiny. Likewise, it is generally accepted that restrictions on the ability to carry a handgun outside one's home are subject to intermediate scrutiny. However, restrictions on an individual's ability to carry a gun in his home or on his private property, that is not open to the public, should be subject to a stricter scrutiny.

evoke violent reactions. For example, controversial information is consistently conveyed in places of worship as opinions on religious topics are often met with high levels of opposition.

A place may also be deemed sensitive based upon the type or number of people present. A higher density of people may make a place more attractive to a person intending on inflicting the greatest damage possible, and should, therefore, be categorized as sensitive. Also, the presence of government officials, judges, preachers, and other figures may make a place sensitive as they often make controversial decisions or convey controversial information and are more obvious targets.

C. Factor Two: Is the Place Private or Public?

Second, the place must be evaluated as public or private. If the gun control measure applies to public land, the government making and enforcing the law is presumed to have a greater power in issuing regulations as opposed to a regulation that applies to gun carrying on private land. A law restricting gun carrying on private land should be viewed with skepticism and possibly a higher level of scrutiny, as historically governments have had less power to tell private citizens what legal items can and cannot be brought onto their land. The use of the place in question must be a further consideration. That is, if a privately owned place is opened up to the public, the government would have more power to control what goes onto that land than if it were not open to the public.

This factor may be understood more easily if one analogizes the ability of the State to restrict handgun carrying in certain places to the difference in the government's ability to regulate speech in public and non-public forums. Within the context of First Amendment free speech cases, a public forum is a place in which individuals are allowed more freedom to speak and are subject to less subject matter and speaker identity restrictions.¹¹⁵

¹¹⁵ 16A AM. JUR. 2D *Constitutional Law* § 543 (2009); see also *Municipal Police Power and Ordinances*, 7 MCQUILLIN MUN. CORP. § 24:439 (3d ed. 2011) (stating that "[r]egulation of the kind of property traditionally made available for public expression—such as a street or park—is subject to the highest scrutiny, and will survive only if narrowly drawn to achieve a compelling state interest. . . . If the property is not a public forum at all, limitations on expressive activity on that property

However, in a non-public forum, the government may restrict what the speaker says as long as that restriction is viewpoint neutral and reasonable.¹¹⁶ The concept is the same when considering this second factor. A government's ability to restrict gun carrying varies depending upon who owns the property and the activity taking place on the property upon which the prohibition is in place.

D. Factor Three: Is Sufficient Security Provided?

The third part of the analysis involves examining the type and level of security provided in the place where gun carrying has been restricted. Metal detectors and guards performing screenings provide types of preventive security; however, these types of security may be ineffective without the presence of sufficient armed personnel. The most effective means of protecting people within a place with a handgun restriction is the presence of either armed security guards or police officers. A failure to provide sufficient security effectively renders the people within the sensitive place without any form of defense. The particular circumstances present in each case will decide the outcome of this third factor. For example, the fact that some form of security is provided in a place where handguns are prohibited is not enough to constitutionally validate the law. The security provided must be sufficient to protect the citizens in that place.

E. Determining Sufficiency

The fact that this third factor calls for "sufficient" security raises the question as to what is sufficient. A subjective analysis can be employed to determine whether or not sufficient security is provided. This must be so, as it is difficult to quantify amounts of sensitivity and amounts of security. However, an analysis of the ratio of the level of sensitivity to the amount and type of security may provide a rough standard to determine these levels.

A logical approach to this problem could be to assign a level of sensitivity to a place based upon how many sensitivity factors

need only be reasonable so long as the regulation is not an attempt to silence a speaker due to disagreement with the speaker's view.").

¹¹⁶ *Id.*

were used in the first step of the analysis. The more factors present that contributed to that place being labeled sensitive, the higher level of sensitivity that place will earn. For example, in government buildings, there is often sensitive information, activities, and personnel present. For illustrative purposes, we can say the presence of three factors qualifies a place as highly sensitive. Public schools may be deemed to have a medium to low level of sensitivity because they are sensitive usually only because of the type and density of people in that place. Accordingly, the government building should have a higher level of security than the school.

The same approach may be taken in regard to the level of security assigned to a place for purposes of this analysis. That is, the level of security achieved by a place will go up based upon the number of security measures in place. However, in evaluating security levels, a further judgment may be made on the effectiveness of the security measures. For example, a place that has security cameras, metal detectors at entrances, and some form of screening procedure has in place three security measures, but these measures without the presence of armed security guards or police officers decrease the overall level of security for purposes of this analysis. Likewise, a place that provides a number of armed security guards or police officers in reasonable proportion to the number of people in a place can be labeled as having achieved a high level of security.

Once the levels of sensitivity and security have been determined, the court must determine whether these levels are in reasonable proportion to each other. Once again, this will entail a subjective determination by the court. However, logic may provide all the guidance that is needed in this ratio analysis. A low level of sensitivity mandates at least a low level of security or higher. Likewise, a high level of sensitivity demands a high level of security.

F. Limits on the Application of the Three-Factor Analysis

As discussed earlier, this Comment should not be misinterpreted as advocating for the absolute right to carry a handgun into any and all places. Rather, the proposed test only advocates for the ability of individuals to carry with them the

right of self-defense or security in places where they have a right to be and, if applicable, where the private owner allows for the carrying of handguns.

It is important to recognize that this analysis only applies to restrictions placed upon the carrying of handguns by state legislatures. That is, an owner of private property may prohibit the carrying of handguns on their property without being forced to provide sufficient security. This must be the case because it would likely place an undue burden upon the owner or be financially impossible for private individuals to provide for sufficient security for all those present on the property. People can prohibit others from carrying guns on their property just as proprietors of places of worship can make their own decision to prohibit the carrying of guns on their property.

V. JUSTIFICATION, AN ALTERNATIVE, AND RELEVANT COUNTERARGUMENTS

A. Logical Justification of the Three-Factor Analysis

Simple logic can be used to explain this proposed three-part analysis of sensitive place gun control laws. A law that prohibits the carrying of handguns into a certain place will only be effective in deterring handgun carrying by those people whose desire to carry a handgun is trumped by their desire to obey the law.¹¹⁷ A law banning the carrying of handguns into a place will not deter someone intent on using a handgun for criminal purposes.

Further, a place in which law-abiding citizens are unable to carry handguns for self-defense should be particularly appealing to a criminal who does have a gun, or any kind of weapon that gives him an advantage over an unarmed victim. The offer of little

¹¹⁷ In discussing a proposal to ban guns within government buildings in Hartford, Wisconsin, President of the Hartford Common Council echoed this sentiment stating that "[a] sign in front of a building is not going to stop the bad guys from walking into the building with a handgun. All it does is make sure that those people who are law-abiding don't have a handgun. . . . What it does is it assures the bad guys that the only people who are going to have guns in the buildings are bad guys. That to me is rather ridiculous." Mike Johnson & Larry Sandler, *Some Cities Act to Ban Guns from Government Buildings*, J. SENTINEL ONLINE (Aug. 20, 2011), <http://www.jsonline.com/news/statepolitics/128132258.html>.

or no resistance by the victim increases the likelihood that a criminal will be successful in executing the crime. This same logic can be used when examining a lack of sufficient security in a place. Someone intent on committing a crime would naturally choose a place which provides the best opportunity to successfully carry out that crime. The most daunting obstacle in the execution of a crime is the presence of a security or police force. Knowledge of a lack of security or police in a certain place, along with the knowledge that the law-abiding citizens in that place cannot carry handguns, presents the successful completion of a crime to the criminal on a silver platter.

B. Sensitive Places Licensing Alternative

Critics of this approach may agree with the idea of continual availability of defense and security but oppose the implementation of a sufficient security force due to the large administrative costs that will come with this approach. A knee jerk reaction to this opposition would be to claim that a state cannot limit the security of its citizens simply because it costs too much. However, in the real world, a lack of resources often prevents governments from implementing ideal legislation.

An alternative to, and a way to completely forgo, strict adherence to the three-factor analysis introduced earlier—which may not be viable for some financially stretched states—would be to allow for a tiered handgun licensing system. A tiered, or enhanced, licensing system may be employed if a state wishes to restrict the ability of people to carry handguns in sensitive places and cannot afford to provide security, while also recognizing the need for some available means of defense for individuals in those sensitive places.

Under this proposed compromise, a state may offer the ability to obtain a license to carry a handgun in non-sensitive places (first tier) as discussed in the background section of this Comment. For many states, this would simply mean that they would keep their current carry statutes, which usually involve meeting an age requirement, not being convicted of a felony, and following the

state's application process.¹¹⁸ However, a state must also provide for the ability to obtain a license to carry a weapon in sensitive places (second tier) if sufficient security cannot be supplied. This license can contain additional requirements that the general license does not.¹¹⁹ For example, a state may require that an applicant complete some type of instructional or educational course on the carrying of handguns in sensitive places. However, the additional requirement cannot impose an undue burden upon the applicant so as to make acquiring the license virtually impossible.

C. Counterarguments

Skeptics of this approach may challenge the point from which this analysis begins. That is, they may claim that a sensitive place does not necessarily mean that some form of security must be provided, but instead that a sensitive place simply renders an

¹¹⁸ For example, the State of Mississippi provides for the licensing of its citizens to carry concealed pistols or revolvers in § 45-9-101 of that state's code. Mississippi requires that an applicant be twenty-one years or older, not suffer from any physical or mental infirmity or addiction that would prevent that person from the safe handling of a gun, not have been convicted of a felony, and not be prohibited by federal law to obtain a license to carry a concealed weapon. MISS. CODE ANN. § 45-9-101(2) (2011). The applicant must fill out a form, provide a full-face photograph, a full set of fingerprints, and sign a waiver "authorizing the Department of Public Safety access to any records concerning commitments of the applicant to any . . . treatment facilities . . . and permitting access to all the applicant's criminal records." MISS. CODE ANN. § 45-9-101(5) (2011). Section 45-9-101 also provides that a person who does obtain a license cannot carry a concealed gun into any police station, courthouse, meeting place of a governing body, establishment primarily devoted to serving alcohol, school, college, university, airport, church, place of worship, or any other place that federal law prohibits the carrying of guns into. MISS. CODE ANN. § 45-9-101(13) (2011).

¹¹⁹ Mississippi provides the opportunity for its citizens to obtain an "enhanced" permit to carry a concealed weapon in places that are prohibited under § 45-9-101. MISS. CODE ANN. § 97-37-7(2) (2011). The relevant section states:

A person licensed under Section 45-9-101 to carry a concealed pistol, who has voluntarily completed an instructional course in the safe handling and use of firearms offered by an instructor certified by a nationally recognized organization that customarily offers firearms training, or by any other organization approved by the Department of Public Safety, shall also be authorized to carry weapons in courthouses except in courtrooms during a judicial proceeding, and any location listed in subsection (13) of Section 45-9-101, except any place of nuisance as defined in Section 95-3-1, any police, sheriff or highway patrol station or any detention facility, prison, or jail.

MISS. CODE ANN. § 97-37-7(2) (2011).

individual's right to carry a gun restricted. This position does have support, as it has been the generally accepted meaning of "sensitive places." However, this accepted view of sensitive places essentially disregards a citizen's right to self-defense. No matter where a person is, he or she still has a right to some form of protection, whether that be through self-defense or through protection provided by the government or other agency.¹²⁰

As discussed earlier, the inevitable difficulty in quantifying sensitivity and security will likely be pointed out as a weakness of this proposed approach. However, there is no need to conduct this subjective analysis with scientific exactitude. The adoption of the standard proposed earlier will provide a level of guidance to review sensitive place handgun restrictions that did not previously exist. In previous cases, judges were simply left with the broad discretion to deem a place sensitive due to the presence of any factor they thought could possibly justify that label. A step in the direction of clarity and uniformity must be seen as an improvement.

CONCLUSION

The lack of explanation of the "sensitive places" dictum given by the Court in *Heller* has provided legal scholars with an issue ripe for debate. Despite the traditional acceptance of place restrictions on handguns, the time has come to reevaluate this tradition in light of *Heller's* emphasis on self-defense. Applying principles within due process jurisprudence, one can conclude that a state assumes a protective role over those individuals found within sensitive places who have had their right to bear arms momentarily suspended while present therein. This protective role implies a duty to protect those individuals from threats of violent crime that could otherwise be repelled with the use of a handgun.

Applying intermediate scrutiny to handgun restrictions within sensitive places, it is clear that a government that fails to provide sufficient security has unconstitutionally violated those individuals' Second Amendment rights. Examination of the handgun restriction under the proposed three-factor analysis proves the constitutional violation.

¹²⁰ Volokh, *supra* note 26, at 1515.

First, a court must determine whether or not the place in question is sensitive. Generally, places are labeled as sensitive due to the people, information, or activities that are contained or carried out within that place. Second, a court must determine if the place in question is publicly or privately owned, and if privately owned, whether or not the public is invited to enter the premises. Finally, a court must determine if the security provided is sufficient to ensure the security of those found in that place. The sufficiency of security can be determined by comparing the level of sensitivity of that place to the level of security provided. Despite an inevitable level of subjectivity involved in carrying out this proposed analysis, it provides a much needed starting point for evaluating handgun restrictions where no framework for evaluation existed before.

The politically moderate nature of this analysis must also be considered. Despite the fact that the analysis subjects government restrictions on handgun carrying to a higher level of scrutiny than previous evaluations, it also mandates the licensing of the individual carrying the handgun. States with liberal licensing statutes may need to require a higher level of qualification for those individuals seeking to carry guns in sensitive places. Finally, states may completely prevent the carrying of handguns in sensitive places simply by providing a sufficient security force therein.

*Brian C. Whitman**

* The author is a third-year student at the University of Mississippi School of Law, where he is an Associate Cases Editor of the *Mississippi Law Journal*. He wishes to thank Professor Jack W. Nowlin and Professor Christopher Green for their guidance in writing this Comment; his editors at the *Mississippi Law Journal* for their patience and suggestions; and his family and friends for their support throughout the writing and editing of this Comment.



